DATE: March 3, 1998
CASE No.: 95-CAA-19

In the Matter of
BRENDA W. SHELTON,
Complainant,

v.

OAK RIDGE NATIONAL LABORATORY; LOCKHEED MARTIN ENERGY SYSTEMS, INC.; MARTIN MARIETTA CORPORATION; MARTIN MARIETTA TECHNOLOGIES, INC.; LOCKHEED MARTIN CORPORATION; UNITED STATES DEPARTMENT OF ENERGY; [1]
Respondents.

Appearances:

Edward A. Slavin, Esq.
Deerfield Beach, Florida
For the Complainant

E. H. Rayson, Esq. and John C. Burgin, Jr., Esq.
Kramer, Rayson, Leake, Rodgers & Morgan, Knoxville, Tennessee
Patricia L. McNutt, Esq., Assistant General Counsel
Lockheed Martin Energy Systems, Oak Ridge, Tennessee
For the Corporate Respondents[2]

Robert James, Esq.
Office of Chief Counsel, U. S. Department of Energy, Oak Ridge, Tennessee
For the U.S. Department of Energy

Before: PAMELA LAKES WOOD
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

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[1] Dr. Wilbur D. Shults was originally a party but was dismissed by Stipulation executed by counsel for the Complainant and counsel for Dr. Shults, pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure on August 30, 1995. This matter is discussed further ***infra.***

[2] "Corporate Respondents" refers to the Respondents except for the Department of Energy. "MMES" and "Energy Systems" refer to what is now Lockheed Martin Energy Systems. "Lockheed Martin" and "Martin Marietta" refer to Energy Systems or its parent companies.

This is a proceeding brought under the employee protection provisions of the Clean Air Act (CAA), 42 U.S.C. § 7622; the Energy Reorganization Act (ERA), 42 U.S.C. § 5851; the Solid Waste Disposal Act (SWDA), 42 U.S.C. § 6971; the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9610; and (for the claim against the Department of Energy) the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2622. [3] These provisions protect employees against discrimination for attempting to carry out the purposes of the environmental and energy statutes of which they are a part, and specifically for preventing employees from being retaliated against with regard to the terms and conditions of their employment for filing "whistleblower" complaints or for taking other action relating to the fulfillment of environmental health and safety or other requirements of these statutes.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PROCEDURAL BACKGROUND/ HEARING RECORD

Complainant Brenda Washington Shelton ("Complainant"), through counsel, filed a complaint with the Wage and Hour Division in Knoxville, Tennessee, on March 5, 1995.[4] She alleged that she had been "discriminated against, intimidated, publicly humiliated, coerced and restrained from protected activity under whistleblower laws" in punishment for (1) her testimony in ***Varnadore v. Oak Ridge National Laboratory,*** 92-CAA-2, 5; 93-CAA-1; (2) concerns that she raised concerning Mr. Varnadore's placement near radioactive waste barrels and the impact of those concerns; (3) her pointing out problems' in Corporate Respondents' Health Physics Department; (4) her truthful statements to company lawyers concerning Mr. Varnadore's complaint before the Department of Labor; and (5) "her protected activity in a case now before the Secretary of Labor" that has been widely publicized in the local news media, ***The New***

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[3] Complaint ¶ 15. Collectively these statutes except for the Energy Reorganization Act ("ERA") will be referenced as "the environmental statutes." While the original complaint also asserted a cause of action based upon whistleblower protection provisions of the "Resource Recovery and Control Act (RCRA)" (***sic***) [apparently a reference to the Resource Conservation and Recovery Act, which is another name for the Solid Waste Disposal Act, ***see*** 42 U.S.C. § 6901] and the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2622 [Complaint ¶ 15] and also referenced the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j-9(i) [by initials in the caption, without further discussion], the Wage and Hour Division ("Wage and Hour") did not find discrimination under those statutes. Wage and Hour's findings with respect to the applicability of these statutes were not appealed by the Corporate Respondents. As the Complainant appealed the dismissal of DOE and Dr. Shults, I find that the TSCA also applies with respect to claims against them but that any SDWA claim has been abandoned.

[4] Although the Complaint is dated March 5, 1994, that date is apparently a typographical error.

York Times, and ***CBS Evening News.*** She alleged that she had been subjected to a hostile working environment that had worsened within the last two weeks when she was, on February 23, 1995, given an Oral Reminder regarding her "alleged use of allegedly obscene and profane language in the workplace." Complainant sought compensatory and punitive damages, attorney fees, and injunctive relief against the Corporate Respondents,[5] Dr. Shults, and the U.S. Department of Energy. (Complaint ¶¶ 1, 4, 89, 90).

Following an investigation, the Wage and Hour Division in Nashville, Tennessee ("Wage and Hour") issued a ruling in favor of the Complainant, in part, on June 14, 1995. Wage and Hour found that "the weight of the evidence to date indicates that Brenda Shelton was a protected employee engaging in protected activity within the scope of the Energy Reorganization Act, the Clean Air Act, the Comprehensive Environmental Response, Compensation, and Liability Act, and the Solid Waste Disposal Act and that discrimination as defined and prohibited by the statutes was a factor in the actions which compromise (***sic***) her complaint." Although Wage and Hour found that Oak Ridge National Laboratory and Martin Marietta Energy Systems were employers subject to the Act, it found that there was no evidence to support a finding that either the Department of Energy or Dr. Shults were responsible parties. Specifically, Wage and Hour found that Ms. Shelton "was discriminated against by the disciplinary action taken against her by MMES on February 23, 1995, when she was given an Oral Reminder regarding her use of obscene and profane language in the workplace"; that this disciplinary action was an example of disparate treatment suffered by Ms. Shelton; that the respondents did not demonstrate they would have taken such action against Ms. Shelton absent her protected activity; and that "the adverse action could be linked to Ms. Shelton's protected activities as a health physicist." The remedies ordered were immediate removal of the Oral Reminder from Ms. Shelton's personnel file, the ceasing of all discrimination based upon protected activities, and payment of costs and expenses, including attorney's fees.

By Order of August 2, 1995, Acting Chief Judge Vittone found that the appeal filed in this matter by the Corporate Respondents, which was sent to Wage and Hour and to the parties but not to the Office of Administrative Law Judges, would be accepted and denied the Complainant's request for default judgment. In this regard, as set forth in Judge Vittone's July 24, 1995 Order, the determination letter from Wage and Hour was received by the Office of Administrative Law Judges on June 19, 1995. Following an inquiry to the Office on July 21, 1995, counsel for the Corporate

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[5] The Corporate Respondents were originally listed as Oak Ridge National Laboratory, Martin Marietta Energy Systems, Inc., Martin Marietta Corporation, Martin Marietta Technologies, Inc., Lockheed Corporation, and Dr. Wilbur Dotrey Shults. According to the Corporate Respondents' Hearing Request, Martin Marietta Corporation and Lockheed Corporation entered into a merger, following which various subsidiaries changed their names.

Respondents faxed a hearing request bearing a service date of June 16, 1995 and indicating that service had been made upon the D.C. and Nashville offices of Wage and Hour, Complainant's counsel, and counsel for the United States Department of Energy at Oak Ridge. A "cross appeal" from the Complainant, appealing from those portions of the Wage and Hour determination in favor of the Department of Energy and Dr. Shults and requesting a hearing on all issues and remedies, was received by the Office of Administrative Law Judges on June 20, 1995. The Complainant and the Corporate Respondents responded to Judge Vittone's July 24, 1995 Order on July 30, 1995 and July 28, 1995, respectively. I find no reason to disturb Judge Vittone's determination that Corporate Respondents' failure to file a timely appeal with this office was due to a clerical mistake and that the Complainant has not been prejudiced thereby.

Thereafter, the case was assigned to the undersigned administrative law judge, who issued a Notice of Hearing and Prehearing Order on August 8, 1995, and a Notice of Continuation of Hearing on September 13, 1995. Respondent U.S. Department of Energy ("DOE") filed a motion to dismiss on August 9, 1995 and Respondent Shults filed a motion to dismiss on August 18, 1995. Following discovery and prehearing proceedings, the hearing in this matter was held from August 28, 1995 through September 1, 1995 and from September 20, 1995 through September 22, 1995.[6] A Stipulation of Dismissal, in which the Complainant and Respondent Shults stipulated that Respondent Shults should be dismissed with prejudice pursuant to Rule 41(a)(1)(ii), Federal Rules of Civil Procedure, was received at the hearing on August 30, 1995.

The following witnesses testified at the hearing, and their testimony appears at the transcript pages following their names: J.D. Stooksbury (Tr. 58-79); Johnny Lynn (Tr. 79-101); Ronald Lee Mlekodaj (Tr. 104-63); Mylissa Craze (Tr. 163-79); Jerry Hunt (Tr. 180-281); Herman X. Phillips (Tr. 318-50); Dr. E.E. Levey (Tr. 352-410); Clyde Lynn Sowder (Tr. 411-585, 602-637, 1728-92); James David Mayton (Tr. 637-725; 1091-97); Brenda W. Shelton (Tr. 726-837; 840-1102; 1927-1936); Steve Sims (Tr. 964-1089); William L. Robbins (Tr. 1106-76); Lois J. Jago (Tr. 1176-88); Clayton L. Carpenter (Tr. 1191-1202); William T. Roberts (Tr. 1203-20); Max Boren (Tr. 1221-95); James Payne (Tr. 1319-82); Bryan Pemberton (Tr. 1396-1420); Ron Cuevas (Tr. 1420-

[6] A review of the transcript reveals that it is replete with transcription errors. Although Complainant had requested leave to propose corrections in her counsel's letter of November 1, 1995, I will instead only address errors to the extent relevant to the discussion herein. References to the transcript will be to "Tr." followed by the page number; where pertinent, the name of the witness will be listed parenthetically. Administrative Law Judge Exhibits will be identified as "ALJ"; Department of Energy Exhibits as "DOE"; Complainant's Exhibits as "CX"; and Corporate Respondents' Exhibits as "RX", respectively, followed by the exhibit number. Multiple references will only appear when deemed to be useful. In many instances, the same event or matter was reported by several witnesses and addressed by several exhibits.

35); Nelson Ramsey (Tr. 1437-54); Gerald Watson (Tr. 1455-1695); Julie Dorsey (Tr. 1696-1713); Don Robbins (Tr. 1713-22); and Jerry Swank (Tr. 1792-1922). Due to health problems, Mr. Spence did not testify. His notes on the February 10 incident (RX 27) and his statement before Wage and Hour (CX 16) are of record.

At the hearing,[7] DOE Exhibits 1 and 2; CX 1 to 35[8] and 38 to 94; and RX 1 to 40, and 42 to 46 were received into evidence.[9] RX 41, a procedures excerpt, was discussed on the record but was not identified or received as an exhibit, and it was not entirely clear that I admitted RX 35 and 36, although I had intended to do so. (Tr. 856-57, 952-55, 1787-88). I find the failure to identify or offer RX 41 was due to mere oversight, there is no reason to question its authenticity, and no party would be prejudiced by its admission. Accordingly, I now admit RX 35, 36 and 41 into evidence. **SO ORDERED**.

Following the hearing, the record was kept open until November 1, 1995 for receipt of posthearing evidence, a briefing schedule was established, and certain posthearing matters were resolved. In accordance with this directive, the Complainant submitted Complainant's Exhibits 95 through 100 and Respondents submitted Complainant's Exhibits 102 and 103, all of which I now formally admit into evidence. **SO ORDERED**. Although Complainant's exhibit numbers 101 and 104 were "reserved" for certain potential exhibits, such exhibits were never submitted. Briefing was completed and the record closed in March 1996. By Order of August 8, 1996, I ordered that there would be no further briefing, except that counsel would be permitted without argument to bring supplemental authorities to my attention and such authorities were thereafter periodically cited by all the parties.

By Orders of November 14, 1997 and December 12, 1997, I admitted into evidence Complainant's Exhibit 105, consisting of Complainant's November 10, 1997

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[7] ALJ 1 and 2 (for identification) are the same as RX 10 and RX 2. (Tr. 41, 159).

[8] No copies of Complainant's Exhibits 2 and 3 were submitted to avoid duplication as these exhibits are the same as Respondent's Exhibits 13 and 31, respectively. Although Complainant's Exhibit 8, Judge Von Brand's recommended decision in ***Varnadore***, was admitted into evidence, it was not admitted for the truth of the matters stated therein. Complainant's Exhibits 36 and 37 were excluded at trial, although CX 36 is among the exhibits bound by the court reporter. CX 37, identified as a tape of Joe La Grone's voice mail, is not present. (Tr. 304-09, 949-50). CX 67, a continuation of Mr. Sowder's file and notes appearing at CX 11, was provisionally admitted, subject to the parties agreeing upon its contents, and later a copy was submitted; it is not bound with the other exhibits. (Tr. 1946).

[9] See the transcript at Tr. 27-34, 41, 102, 304-09, 508-09, 700, 856-57, 947-49, 952-55, 963, 1165, 1178-1180, 1189, 1230, 1257, 1286, 1356, 1401-02, 1423-26,1447-52, 1490-92, 1508, 1535, 1676, 1727, 1732, 1734, 1757-59, 1763, 1767, 1773, 1783-84, 1797-98, 1808, 1820, 1823, 1862, 1910, 1924, 1926-32, 1946-49.

communication and attached newspaper article discussing the hiring by Lockheed Martin of Joe La Grone, a former DOE manager, with the newspaper columnist's statements related thereto stricken, and Complainant's Exhibit 106, consisting of Corporate Respondents' Internal Release/Organizational Announcement announcing Mr. La Grone's appointment.

FACTS

Brenda Shelton's Background

Brenda Washington Shelton is a senior health physics technician who, at the time of the hearing, had worked for Lockheed Martin at Oak Ridge National Laboratories for eight years. She has five children, three of whom were still at home, and a grandbaby. Her ethnic background is one-eight American Indian, one-fourth Chinese, and African American. (Tr. 726-27 [Shelton]). As a health physics technician, her job is to protect personnel against radiation exposure. (Tr. 735). She was promoted to senior health physics technician in February 1995. (Tr. 874).

Ms. Shelton was recruited by Martin Marietta when she was still living in Memphis. She was eager to leave the Memphis area as her two teen-age sons had been approached and asked to join a gang. (Tr. 728-29). Although Ms. Shelton started as clerk typist in 1986, she was encouraged by her supervisor to go back to school so that she could better utilize her skills. She decided to attend college at the University of Tennessee and sought afternoon work so that she could go to school during the day. The only available afternoon work was as a janitor, so she accepted a janitorial position in 1987. (Tr. 730-32 [Shelton]; RX 45 [Shelton statement]).

Ms. Shelton first applied to become a health physics technician in 1989 or 1990. Following her selection, she completed three months of training in February 1991, and she received a certificate after passing certain tests. She attributes her selection to a complaint that had been filed because there were no black employees in the training program. Her first supervisor in health physics was Ron Mlekodaj, and she mainly did "green tag" work at that time, which involved checking items for radiation and tagging them (Tr. 735-36; RX 45 [Shelton statement]).[10]

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[10] Although at the time of the hearing Ms. Shelton was uncertain as to what year she changed jobs, other documents reveal that she began her employment as a health physics technician in 1991, as she was on the janitorial staff in February 1990. (***E.g.,*** CX 91; RX 37, 38). She testified at her April 6, 1992 deposition in the ***Varnadore*** case (when her recollection was fresher) that she was accepted into the training program in September 1990 and graduated in February 1991, when she became a health physics technician. (RX 31 at p. 5).

Following a brief stint with another office, she received her current assignment, under the supervision of complex leader and health physicist, Lynn Sowder, in April 1992. (Tr. 411, 419-20, 424, 635 [Sowder], Tr. 744-47 [Shelton]; Tr. 1857 [Swanks]). Mr. Sowder is in John Spence's group (Survey Group I), which is one of the groups reporting to Jerry Hunt, the head of the Radiological Surveillance Section. (RX 9, 10 [Organization Charts]). Mr. Hunt's group (which was formerly Dr. Mlekodaj's group) is the largest section under Dr. Steve Sims, Director of the Office of Radiation Protection. (Tr. 105 [Mlekodaj]; Tr. 964-65, 970-72 [Sims]; RX 9, 10 [Organization Charts]). The Office of Radiation Protection (and Dr. Sims) in turn report to Jerry Swanks, Associate Director, Operations, Environment, Safety, and Health. (Tr. 1793-94, 1799 [Swanks]; RX 10).[11]

Problems with Janitorial Supervision

Ms. Shelton testified that her acceptance of a janitor position "wasn't received very well," as it was unusual for someone to move from a secretarial position to a janitorial one. She felt that she was being discriminated against. Also, she testified that "[s]ome of the supervisors I had I suppose didn't really care for my personality," and she was passed from supervisor to supervisor. She would listen to what the supervisor told her to do and then would do it her own way, which she believed to be more efficient, instead. (Tr. 730-32). When one of her supervisors asked her to wear someone else's safety shoes when her own shoes had worn out, she testified that she made a complaint to Clyde Hopkins, then president of Martin Marietta Energy Systems, who advised her to work down the chain of command. In connection with this complaint, she included other allegations, which she testified were found to be true, with the exception of one relating to extended lunches. She testified that eventually she was referred to James Bryson, who was in charge of work force diversity; Mr. Bryson told her he did not believe her to have a valid complaint based upon the documentation she submitted. She then took her complaint to George Oliphant, the next level down, who investigated and found that the supervisor admitted she had asked Ms. Shelton to wear someone else's shoes. No disciplinary action was taken against any of her supervisors. (Tr. 732-34 [Shelton]).

Gerald Watson, Superintendent of Personnel Relations at Oak Ridge, a credible witness, also testified concerning Ms. Shelton's difficulties with her supervisors on the janitorial staff. He testified that one of her janitorial supervisors was a white female and two were black males. (Tr. 1563). In the course of investigating complaints by Ms. Shelton that she was being mistreated, given unfair job assignments, and held to a different standard than the other janitors, he learned that she had had a confrontation with one of her supervisors. He testified that when he met with the supervisor, she told

[11] As noted above, Mr. Spence did not testify, but his notes (RX 27) and his statement (CX 16) are in evidence.

him that "Ms. Shelton had confronted her in a very agitated way, abusive way, told her that she was going to pop her fat ass with a discrimination suit. . . ." (Tr. 1487; ***see also*** Tr. 1625). Mr. Watson's contemporaneous notes (2/23/90) (apparently based upon an interview) substantiate this account, and also indicate that (1) Ms. Shelton became loud and started pointing her finger in a threatening manner at the supervisor (Sissy Richardson) before making this remark and (2) when Ms. Richardson suggested she complain to her supervisors, Ms. Shelton said, "F--k you all – I have talked to them before"[12] and then went on to curse co-workers and other supervisors, at which point Ms. Richardson walked away. (RX 38). Mr. Watson testified that after completing the investigation, he found no basis for Ms. Shelton's complaints. However, she then filed an affirmative action claim which was addressed by Mike Terry, who found that corrective action needed to be taken. (Tr. 1486-88, 1563-64, 1625 [Watson]). Mr. Watson recalls having met with Ms. Shelton in connection with this matter, which she denies. (***Compare*** Tr. 1565 [Watson] ***with*** Tr. 1927-29 [Shelton]). Ms. Shelton's contemporaneous notes (dated February 23, 1990) complain about scrubbing assignments. (CX 91). Notes by Gerald Watson dated March 13, 1990 concerning a March 9 meeting relating to the shoe incident and related claims appear as CX 65. They indicate Ms. Shelton felt she was being retaliated against based upon a sexual harassment complaint she had filed, and they make reference to a "blow up with Sissy." (Tr. 1508 [Watson]; CX 65).

A copy of Mr. Terry's investigation report appears as RX 37 (Tr. 1565). Although finding a basis for some of her complaints (such as her being reprimanded at group meetings, transferred to different job assignments without any discussion, and directed to scrub floors alone for extended periods, contrary to the usual practice), he also found "[e]vidence that Brenda has been abrasive, and boisterous when dealing with supervisors and other employees," a personality trait which was "witnessed at least twice, in conversations she had with supervisors." (RX 37). On this matter he concluded, in his June 28, 1990 Affirmative Action Report:

> Brenda's abrasive and boisterous attitude in dealing with others is not condoned by this company, and is not thought of as being an accepted practice by any employee or supervisor. **Her use of profanity in conversations with supervisors is thought to be provoking and even borders insubordination**; especially as this is done in the presence of others. . . . [Emphasis added.]

(RX 37). As one of his "Solution Recommendations", he noted that Ms. Shelton needed "to exercise restraint and self control when discussing work assignments with

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[12] In quoting obscenities in this decision, I have quoted the exact language appearing in documents. When a term appears to be redacted, that is the way it appeared in the original.

supervision" and he recommended that she use the contracted grievance procedure if unable to achieve results. (RX 37).

Varnadore Case

Ms. Shelton had been a health physics technician for less than a year when she became involved in the ***Varnadore*** case. She talked to Wage and Hour investigators and was deposed in Mr. Varnadore's case, and she also appeared before the Rod Nelson panel [comprised of DOE managers] investigating Mr. Varnadore's concerns; they made her feel as if she were being interrogated. However, she did not actually testify in the ***Varnadore*** case (except by deposition) because she was coughing up blood at the time of the hearing for an unspecified lung problem. She did not meet with Judge William Webster or the firm of Milbank, Tweed, Hadley & McCloth. (Tr. 747-50).

In August 1991, while on the way to get a Pepsi, she observed an employee named Bud Varnadore sitting in Room R-151 (of Building 4500 South), which she believed to contain hazardous waste, radioactive waste, asbestos, and chemicals. He was sitting approximately three feet from a couple of radioactive waste drums. She advised Mr. Varnadore that this was not an appropriate place for an office and she went to Shar Hollis to see if she could get him moved. Ms. Hollis agreed that he should be moved in order to comply with ALARA, the principle that radiation exposure should be as low as reasonably achievable. (Tr. 736-38 [Shelton]; RX 31 [Shelton deposition]; ***see*** RX 46 [DOE Order, Radiation Protection for Occupational Workers]). Ms. Shelton took radiation readings in Room R-151 and Mr. Varnadore was eventually moved. (Tr. 736-38). Her second line supervisor at the time, Ron Mlekodaj met with her and Ms. Hollis and asked who Bud Varnadore was. According to Ms. Shelton's recollection, Ms. Hollis said, "Just a person" and Dr. Mlekodaj said, "Well, is he a God damned Indian?" At that point, Ms. Shelton left in tears, as she took the remark as a slur against American Indians, and she is partly native American. (Tr. 738-40 [Shelton]).

Dr. Mlekodaj also testified concerning this incident, which took place in August 1991. It was his recollection that Ms. Hollis was excited talking about Mr. Varnadore, whom he had never heard of before and was trying to place, and as the name sounded like that of a native of the country of India, he asked, "Now who is this damn Varnadore anyway? Is he an Indian?" (Tr. 108-10 [Mlekodaj]). Ms. Shelton testified that she could not be mistaken about the exact words used by Dr. Mlekodaj (Tr. 740 [Shelton]). Dr. Mlekodaj is equally certain that he never called Mr. Varnadore a "God damn Indian." (Tr. 115 [Mlekodaj]). However, it is clear that regardless of what version is correct, there was a simple misunderstanding: Dr. Mlekodaj was trying to figure out who Mr. Varnadore was, and asked whether he was an Asian Indian, while Ms. Shelton

interpreted his remark as a racial slur directed against American Indians, and therefore against her, due to her American Indian ancestry.[13]

What is even more significant about this incident is that Dr. Mlekodaj read deposition testimony from the ***Varnadore*** case that he believed to be that of Ms. Shelton "some time early in 1992" and thought that she had "misquoted [him] a couple of times on some of the things that [he] said." Specifically, he referenced the "God damned Indian" remark, as well as another remark concerning exposing pregnant women to radiation at Oak Ridge. (Tr. 107-08, 121 [Mlekodaj]). Ms. Shelton testified that she left before he made the pregnant woman remark as she never heard it. (Tr. 739 [Shelton]). It appears that Dr. Mlekodaj may have attributed Ms. Hollis' testimony to Ms. Shelton, particularly since Ms. Shelton did not testify at a deposition in the ***Varnadore*** case until April 6, 1992 and, while she alludes to having discussed such remarks with counsel prior to the deposition, she does not set forth her understanding of what occurred on the transcript. (Tr. 747 [Shelton]; RX 31 [copy of deposition transcript][14]). Dr. Mlekodaj also testified that he was unaware that Ms. Shelton was part American Indian or that she had burst into tears based on his remark. (Tr. 114-15 [Mlekodaj]). In any event, he appears to have taken umbrage at being misquoted and had negative feelings toward Ms. Shelton following the incident and its aftermath.

Shortly after this incident, Ms. Shelton began to notice some changes at work, and she learned from a calibration technician that she was to be transferred. In addition, she was not asked to help respond to Mr. Varnadore's Freedom of Information Act request and she believed that information involving Mr. Varnadore was being kept from her. (Tr. 741-42). She also became concerned about her performance appraisal, as she had not received one as a health physics technician. She had previously requested a transfer, and she was transferred before her concerns about her performance appraisal were resolved. (RX 45 [Shelton Statement]). Initially, probably

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[13] At trial, Complainant's counsel went to great lengths to establish insensitivity to racial issues on the part of Dr. Mlekodaj, who appears to be Caucasian and who identifies his ethnic background as half Polish and half "a mixture of a lot of things." For example, counsel asked Dr. Mlekodaj whether he had ever used the word "nigger" at work in the past ten years, to which the witness replied that he was sure he had used it in a joking or "kidding around" mode, but not in "any kind of serious talk." (Tr. 135 [Mlekodaj]). However, to the extent that these remarks may be deemed to show any kind of racial animosity, they do nothing to strengthen Complainant's case, as they would merely show an alternate basis for disparate treatment not actionable in this forum. The same thing is true with respect to similar allegations against Mr. Sowder.

[14] For some reason, the deposition includes different exhibits from those listed, and those listed were apparently not annexed. (RX 31). However, the two documents that are attached to the deposition transcript are otherwise in evidence. (RX 37, 38).

in March 1992, she was transferred to one building (3019) for one month, and then she was transferred to her ultimate assignment, in building 3026. (Tr. 153-54 [Mlekodaj]; Tr. 744-47 [Shelton]; Tr. 1857 [Swanks]).[15] According to both Dr. Mlekodaj and Dr. Swanks, her short stint in the first building was planned from the beginning. (Tr. 151-54 [Mlekodaj]; Tr. 1857 [Swanks]). In Building 3019, she worked for complex leader Bryce Powers,[16] and in Building 3026, she worked for complex leader Lynn Sowder, who has been her supervisor since April 1992. (Tr. 745-46 [Shelton]). Building 3026 is an older building, which is not air-conditioned and is in poor repair. (CX 11, CX 20).

[15] Although Dr. Swanks referred to Building 3550, the reference appears to be in error. (Tr. 1857 [Swanks]).

[16] Mr. Powers advised Wage and Hour that during the four to six weeks she was in his group, Ms. Shelton "seemed to be a willing worker and get along with everyone. I do not recall any problems." (CX 21 [Powers Statement]).

Performance Appraisal for 1991 under Ron Mlekodaj

Although Ms. Shelton's performance appraisal or "PPR"[17] was due in January of 1992, it had not been done by March 1992. She saw Mike Terry, the affirmative action representative, in the hall, and mentioned this to him, so he contacted Leila Sutherland, who told her supervisors they had three days to have a performance appraisal done. It was done and she met with Ron Mlekodaj, with whom she had rarely interacted. She took issue with his statement that she lacked interpersonal skills and she refused to sign the appraisal. She attributed the statement to Shar Hollis, who "deemed [her] antisocial because [she] didn't want to listen to the sex talk between [Ms. Hollis] and this other employee, John Johnson." (Tr. 743). When she refused to sign the PPR, Dr. Mlekodaj suggested they go to see Jerry Swanks. Later, she received a call from Clyde Hopkins, whom she believed was contacted by Mike Terry, and he said he would "look at it very judiciously." Thereafter, Dr. Swanks called her in and rewrote the appraisal. (Tr. 743-44 [Shelton]).

Dr. Mlekodaj testified to his recollection that he had given Ms. Shelton a "below expectations" rating in the interpersonal relationships category for the relevant period (from September 1990 through August 1991) based upon things he had heard, some of which involved the use of abusive language. (Tr. 137). Dr. Mlekodaj further testified that when he met with Ms. Shelton to discuss her rating, "She listened carefully to everything I said but when I got to that particular part that said that she needed to improve in interpersonal relationships, why she just exploded and started yelling and complaining about my rating her in that way." (Tr. 138). His understanding was that Ms. Shelton was very unhappy and she called Clyde Hopkins. He testified that some time later it came down the chain of command, and when he was asked by his supervisor, Hal Butler, if he would object to the check mark in "below expectations" being moved to "meets expectations," he said he would not have a problem as long as his comments remained. The next time he saw the performance evaluation the entire page was redone in his supervisor's handwriting and the category had been changed to "meets expectations." Dr. Mlekodaj disagreed with the revised PPR and resented that it had been changed over his signature without him being consulted. (Tr. 139-41, 153 [Mlekodaj]).

Dr. Jerry Swanks, one of five associate directors for Oak Ridge National Laboratory, also gave his account of what happened with respect to Ms. Shelton's performance appraisal. He first interacted with her in April 1992, when Mike Terry, the affirmative action coordinator, advised him that Ms. Shelton was concerned about not receiving her performance review in view of her participation in the ***Varnadore*** case. Dr. Swanks asked her supervisor (Dr. Mlekodaj) and her supervisor's supervisor why it

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[17] "PPR" refers to "Performance Planning and Review [mistranscribed by court reporter as "Performing"]. (Tr. 204 [Hunt]; RX 1, 2, 3, 4).

had not been done, and he learned that it was one of several that had not been conducted due to the press of time. After the appraisal was done, Ms. Shelton took exception to the performance rating that related to interpersonal relationships and a statement to the effect that she had difficulty dealing with co-workers. Dr. Swanks and Mr. Terry made some changes in the review consisting of deletion of the language relating to difficulties with interpersonal relationships and substituting new pages for the old ones, which were torn up. However, he counseled Ms. Shelton "that while we were removing the language from the performance review form, there was the perception on other people's part, particularly her supervisor, that there was some difficulty in that area, and that she should take extra care in the coming year, and then in subsequent times that [she] would act in a manner that would allay any concerns related to that." She was agreeable to that. (Tr. 1803-07 [Swanks]).

Lynn Sowder's Supervision of Ms. Shelton

At the hearing, Ms. Shelton was critical of Mr. Sowder as a supervisor, although she felt that she could work with him and did not want to be transferred, as she found her work challenging. (Tr. 736, 920 [Shelton]). Mr. Sowder's file reveals recurring difficulties regarding his supervision of Ms. Shelton. (CX 11). Initially Mr. Sowder reported to Walt Ohnesorge (CX 69), and after Mr. Ohnesorge left, he reported to Mr. Spence. (RX 9, 10). By all accounts, Ms. Shelton's work was of good quality and, despite attendance problems, she has received acceptable to good performance appraisals from Mr. Sowder. (RX 1, 2, 3).

In June or July 1992, only two or three months after she began working for him, Mr. Sowder asked Ms. Shelton to go over to building 3550 if she had the time, according to notes prepared several weeks later. According to Mr. Sowder's notes, she worked for about 15 minutes that morning and that afternoon complained to Mr. Sowder that he and another technician were standing around and talking at that building, and she thought she should not have to come over for 15 minutes. (CX 11). Ms. Shelton testified that she left after about 15 minutes of surveying, because Mr. Sowder had spent the entire time talking to the technician, Chris Redmon, and that she said to Mr. Sowder, "Lynn, don't ever call me to do somebody else's work while they stand and jawbone with you. If they've got time to jawbone with you, they can do their own work. Don't put me in that situation again." (Tr. 758-59).

Mr. Sowder testified that some time in 1991 or 1992, the same technician, Chris Redmon, had had trouble working in building 3525 with one of the other operating divisions, Metals & Ceramics (M & C). The problem what that he was an ex-Navy employee with a "go by the book type attitude" and he was a little strident. It was necessary to have discussions with Mr. Redmon and meetings with M & C to resolve the matter. (Tr. 613-15 [Sowder]; CX 57.)

Dr. Mlekodaj recounted one incident, which occurred about two years prior to the hearing (which would make it some time in 1993, when Ms. Shelton was under Mr. Sowder's supervision). That incident involved a call from someone named Craig Whitmeyer who was "very upset" and described a "very ugly scene" when young students were brought to Ms. Shelton's building and "Brenda lost her cool and started yelling and screaming about get those people out of here." Apparently swearing was involved. However, he made further inquiries of someone else who witnessed the scene, P.T. Barton, who "tended to down play it" so he decided not to pursue positive discipline. (Tr. 145-47 [Mlekodaj]). It was unclear why Dr. Mlekodaj, rather than Mr. Sowder, was involved in this incident.

A copy of Mr. Barton's account, dated June 15, 1993, appears in Mr. Sowder's file (CX 11). Mr. Barton stated it was "no big deal", it arose out of a misunderstanding whether a student he was escorting was under eighteen and therefore not allowed in the building, he stated he had used "much rougher language before," he had "no complaints," and he felt that the students who overheard his conversation with Ms. Shelton (and apparently reported it) were "supersensitive" (CX 11).

Herman Phillips, an assistant facility manager for the Chem Tech division, radiochemicals technology section, special projects department, is responsible for Building 3026, and has Ms. Shelton work as part of his team on special projects, including the tritium lights project, which was essentially completed in October 1994 (although two shipments remained). This project involved preparing surplus lights for shipment for the recovery of tritium. Chem Tech was paying 50% of Ms. Shelton's salary but needed more help. Ms. Shelton worked approximately four to six hours daily overtime on the project. (Tr. 318-22, 334-35, 341, 343). Eventually a full time employee was hired to help with the health physics work. (Tr. 341-43). Mr. Phillips testified that Ms. Shelton was a hard worker, she was experienced with the facility, and "[his] team is comfortable with Brenda." (Tr. 319, 340).

Ms. Shelton unsuccessfully asked for more help (in the form of another body) in June 1994. She was working on the tritium lights replacement project in addition to her regular surveys, instrument checks, and other health physics duties. (Tr. 751-56, 770-771). She testified she had 13 monthly surveys to do, and throughout the year 21 total (monthly, quarterly, annually or semi-annually), and after she complained to Mr. Sowder and Mr. Hunt, she had 22 to perform. (Tr. 754). She also had laboratory monitors performed on a daily basis and seven monitrons and "blue boys" function-checked weekly and performance-tested once a month, in addition to six continuous air monitors. (Tr. 756). At one point, Mr. Sowder complained that she had not cleaned her office out since October 1993, but she showed him that the paperwork on her desk was all dated from March 1994. When she asked for more help, the solution offered was to have her work more overtime, which she did not consider to be a solution as she was already doing four to six hours overtime on the tritium project. (Tr. 752-754).

Office Cleaning Incident in June 1994

The most serious difficulty between Mr. Sowder and Ms. Shelton arose out of her failure to clean up her office space in June 1994. When she ignored repeated requests, he cleaned up the area himself. Mr. Sowder obtained statements from two witnesses that have also been submitted by respondents as exhibits (CX 11; RX 26, 33). Mr. Sowder's own notes of the incident reflect that Ms. Shelton said he had no right to clean up her office and that she said she would file a discrimination case against him. (CX 11).

According to a handwritten statement by Ron Cuevas dated June 17, 1994, which was provided to Lynn Sowder at his request (appearing as RX 26), he was asked by Mr. Sowder to help her with a list of various items that needed to be corrected in her area, but Ms. Shelton told him on June 7 that she had not completed them "to fuck with Lynn." He, Mr. Sowder, and another employee worked overtime on some of the items in the list. On June 16 at 7:30 a.m., he recounted that:

> [Ms. Shelton] asked w[h]ere was Lynn, I said he wasn't in yet and started to tell her about my dinner at Red Lobster she said she didn't want to hear it, she wasn't in the mood, then she said what gives that motherfucker the right to come over fucken round in my office, [illegible] don't go fucken with any of these other peoples offices. He thinks he can fuck with me cuz I'm black. I've got news for that fucker. The motherfucker came in and cleaned my office last night Ron. He took all my shit out. I'm gonna tell him I want all my shit back or I'll file discrimination charges against him. That motherfucker pissed me off Ron. I told Brenda that I'd better leave before Lynn gets here. (***Sic*** throughout).

(RX 26).

J.D. Brewer also gave Mr. Sowder a handwritten statement relating to this incident, dated June 16, 1994, which also appears as RX 33. He indicated that her eyes flashed with anger and rage when he arrived at the office, and that when he asked her what was wrong, she said:

> I would like to know what gives Lynn the f-----g right to clean up my office. . . .He didn't have the guts to do it when I was here. He (Lynn) waited until I was out the gate. . . . As my f-----g supervisor, it is his f-----g place to write me up if he doesn't like my performance.

(RX 33). In the statement, Mr. Brewer said that he felt as if the anger were directed toward him at times. According to Mr. Brewer, he was present when Ms. Shelton discussed the matter with Mr. Sowder, at which time she was "wound up" and the volume of the confrontation escalated, but she apparently did not use any profanity.

She complained that as her supervisor he should have written her up if she did not follow his orders. Mr. Sowder suggested a meeting be set up with Walt Ohnesorge,[18] at the time the next line supervisor. She declined, but then she said she was going to file a discrimination complaint and she said, "Go ahead and call Walt, I have stuff on him also. Shit." (RX 33 [Brewer statement]; CX 11).

Ms. Shelton testified that although Mr. Sowder had asked her three times to clean up the area, she did not have time to clean up her office, which she kept on explaining to him. She believed that he should not have cleaned up the area and "he should have just wrote me up." While cleaning out the office, Mr. Sowder discarded calendars that she wished to keep for sentimental reasons, but she retrieved them from the trash. (Tr. 768).

Mr. Ohnesorge, who was at the time Mr. Sowder's supervisor, told the Wage and Hour investigator in a telephone interview [19] that Ms. Shelton was "hard to deal with," as when she was counseled about failing to clean up her office; she was "not too cooperative" when asked to complete other tasks; and "[s]he cussed about Lynn Sowder -- not to his face," based upon which they talked to Labor Relations. Mr. Ohnesorge said Ms. Shelton was "not a good health physicist," was "one of the most difficult employees [he] ever supervised," and "was a very touchy person -- it was like walking on egg shells to be around her." He said that he and Mr. Sowder felt she probably could have done the work but that "[s]he spent too much energy being abrasive and did not get her work done." (CX 69).

Instrument and Controls Division/Green Tagging

As part of her health physics duties for the Office of Radiation Protection, Ms. Shelton assisted the Instrumentation and Controls Division ("I & C"), one of the operating divisions. The Office of Radiation Protection ("HP") checks instruments for

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[18] Mr. Ohnesorge was Mr. Sowder's supervisor from 1991 to December 1994. (Tr. 510-16 [Sowder]).

[19] Mr. Ohnesorge's statement (CX 69), taken by the DOL investigator over the telephone, is hearsay if it does not qualify as an admission. ***See*** 29 C.F.R. §§ 18.801-06. Here, the statement is being offered by the Complainant, due to its inclusion of derogatory comments and reference to a case Ms. Shelton brought against the school system, to show "defamation and animus." ***See*** Ms. Shelton's Further Revised Exhibit List (November 1, 1995.) The rules of evidence are more relaxed in this type of proceeding than in Federal district court (***see*** 29 C.F.R. § 24.5(e); §§ 18.402,) and I have indicated that I would give Wage and Hour statements full evidentiary value, although the parties would be able to take the testimony of the witnesses by deposition [mistranscribed by court reporter as "depiction"] (Tr. 1383, 1948). However, given the fact that this statement was taken over the telephone and was not signed, there is a possibility of transcription errors and the statement has less probative value.

I & C while I & C does instrument calibration for the Office of Radiation Protection; personnel from the two sections routinely worked together; and each section treats the other as a "customer." (Tr. 259 [Hunt]; Tr. 1072-73 [Sims]; Tr. 1148 [Robbins]; CX 18 p. 9 [Payne Statement]). I & C personnel worked in Building 3026, for which Ms. Shelton is the health physics technician. Her work involved checking air monitors and filters in the building. When she was out sick for an extended period with pneumonia in late 1994 and early 1995, as discussed below, one of the I & C employees, J.D. Stooksbury, a technician responsible for maintaining radiation protection instruments, noticed that one of the air monitor filters was completely black, indicating that it had not been checked in weeks. Mr. Stooksbury testified that when he brought this matter to Mr. Sowder's attention and expressed concern as to Ms. Shelton's reaction when she returned, Mr. Sowder just shrugged his shoulders and grinned. (Tr. 513-14 [Sowder]; Tr. 58-63 [Stooksbury]) .

Another service provided by Ms. Shelton to I & C was green tagging. According to Mr. Stooksbury, green tagging is used when an instrument technician wants to remove an instrument from a facility or other area and take it back to his shop. Before the instrument can be taken to the other area, it needs to be free of any contamination that could be harmful to the work environment or the workers. The process of green tagging involves running smears (round pieces of paper) over the instrument and putting the smears in a counter to make sure nothing will come off the instrument. The instrument will also be probed to make sure there is no fixed contamination over a certain level. The basic policy is to have the instrument tagged where it is and not to bring an untagged instrument into the building to be tagged. Mr. Stooksbury testified that his supervision had some hard feelings "a few years back" because Ms. Shelton did not want to tag instruments brought out from other areas into her building. (Tr. 65-67 [Stooksbury]).

Ms. Shelton testified that she had had a disagreement with Mr. Payne about this matter, and that he had gone up her chain of command to Walt Ohnesorge with the complaint that she had refused to do her work. She told Mr. Ohnesorge that the shift HP should be tagging those instruments because they are from that area, and she would not green tag them without having the instruments broken down every nut, bolt and screw, because they could be contaminated on the inside. In this regard, some of the air samplers had picked up radioactive contamination from Chernobyl. That was the end of the matter, according to Ms. Shelton. (Tr. 780-82 [Shelton]). In his statement to Wage and Hour, Mr. Payne said that the first time he asked Ms. Shelton to green tag any item, she agreed to do so, but she told him it was not her job and she was not going to do it in the future. (CX 18 at 4). In his statement, Mr. Payne said, "you never knew what kind of mood Brenda was going to be in." He said that once he had asked her for more pocket dosimeters and she said she did not supply pocket dosimeters and "acted as though it was not her job," even though he eventually obtained the dosimeters from Lynn Sowder. (CX 18 at 2).

Mr. Payne testified that there had also been an incident involving a pump, in which Ms. Shelton refused to green tag it because she could not get inside it, but she agreed to do so if he were to sign that he knew the history of the pump. He stated that he was referring to this type of situation in his statement to Wage and Hour to the effect that she would not green tag things if she could not tell if they were clean. Mr. Payne also said that according to an HP bulletin, if something were moved from a clean area to a clean area it did not need to be green tagged. (Tr. 1331-32; 1344-52; CX 18 at 4-5).

Benny Carpenter, Clay's father, was a former supervisor in the I & C shop in Building 3026 at Oak Ridge before he retired. In a telephone statement to Wage and Hour, he indicated that he thought Ms. Shelton was right in the incident with Mr. Payne involving the green tagging of items from a clean area and he had so advised Mr. Payne.[20] He was not aware of any problems involving Ms. Shelton and indicated that if she were cussing the I & C people it would have been brought to his attention. He knew about the incident because Clay is his son and James Payne was his replacement. (CX 61).

Another incident occurred between Ms. Shelton and the I & C technicians which involved a "report card" relating to an instrument that was supposed to be fixed and was not fixed. According to Mr. Payne, Ms. Shelton waved the paper around and said, "I can't believe they sent me this, the fucking thing is still not working. . ." Tr. 1325; CX 18 p. 7-8 [Payne Statement]). In the November 18, 1994 "report card" (for I & C supervisor ME Boren, serviced by RJ Chambers), Ms. Shelton gave consistent zeros (on a scale of one to nine) on the categories of "Courtesy, Integrity of Personnel," "Quality of Workmanship," "Response Time," and "Repair Time 17.0 Hrs," and she noted that "[t]he FRM is still not working" and "[n]one of this equipment has worked properly since 7/7/94." (CX 86). Mr. Boren described the failure to repair this instrument as "embarrassing." (Tr. 1250 [Boren).

Use of Profanity/"Cussing" Incident on February 10, 1995

In late 1994 to early 1995, Ms. Shelton felt overworked and she became ill. In December 1994, she thought she had a bad cold, although it turned out to be pneumonia, and on the morning of December 23 she stayed home from work and slept most of the day. Her son took her temperature at thirty minute intervals, and when it read 106 she was taken to the hospital. She remained in the hospital until December 29 or 30. (Tr. 771-73). Apparently Ms. Shelton's grandbaby was born during her convalescence. (Tr. 727). When she returned to work on the 31st of January, she stated that only three of the thirteen monthly surveys had been done and none of the instruments had been checked. (Tr. 757, 775 [Shelton]). Mr. Sowder testified that

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[20] See footnote 19, ***supra.***

three surveys had been done in January, seven had been left for Ms. Shelton, and three had been done by employees other than Ms. Shelton through February 10; each survey took between thirty minutes and two hours. Mr. Sowder testified that there were only three surveys that remained to be done on February 10 and they had until February 14 to complete them. (Tr. 1762-67 [Sowder]).

On the morning of Friday, February 10, 1995, two weeks after she returned to work, Ms. Shelton was working in Building 3026 on surveys, which she believed needed to be completed on that date, and she was feeling pressured and stressed. (Tr. 757, 775 [Shelton]). Ms. Shelton testified that on February 10 she was approached by Clay Carpenter, an instrument technician with I & C, who asked her to have instruments green tagged for calibration, but before they could be green tagged they needed to be performance tested. (Tr. 778-79). She stated, "I did get nervous, upset, stressed, and I did curse Clay out." (Tr. 779). According to Ms. Shelton, only she and Clay were present during this first encounter. (Tr. 779 [Shelton]). During her rebuttal testimony, Ms. Shelton clarified that she had been green tagging instruments for Mr. Carpenter from the first until the tenth of February. (Tr. 1931).

With respect to this first encounter, Mr. Carpenter testified that he asked Ms. Shelton to green tag instruments ("about six LMAs and LMBs") and that he took them to the area where her office was. (Tr. 1192-93). He further testified that she told him that she would do the job but that when he asked her if she wanted him to bring one specifically to her office or leave it there for her to check, she "started cussing at" him. (Tr. 1193). According to Mr. Carpenter, "The very first thing she said was that she 'did not have time to check my fucking instruments'" and she continued in that manner for between two and four minutes. (Tr. 1193 [Carpenter]).

William Thomas ("Tom") Roberts, another instrument technician, testified that the technicians were scheduled to calibrate the instruments in Building 3026 during the month of February, and that Mr. Carpenter came to him and told him that he had tried pulling some instruments, that Ms. Shelton had cursed him, and that he was not going to go back and do the instruments for a while. (Tr. 1203, 1205). Mr. Roberts also testified that later that day, Ms. Shelton came back to him and told him that she did not have time to green tag the instruments, using profanity, and that still later, she came back to the shop and indicated that the instruments were ready, using profanity once again, and he was offended by her words. (Tr. 1205-06, 1219).

Mr. Carpenter was present with Mr. Roberts and other technicians in the shop area in building 3026 at the time of the second instance of profanity that day involving him (which was the third incident of the day, including the earlier one between Mr. Roberts and Ms. Shelton). He testified that Ms. Shelton said "something like our 'damn instruments were ready, and to clear up her damn hallway,' or something like that." (Tr. 1194). Mr. Carpenter did not hear the rest of what she said because he turned his back and was walking out, and he is hard of hearing in his right ear and is deaf in his

left ear. (Tr. 1194-95 [Carpenter]). Mr. Carpenter testified that he was upset by this episode, and that it had happened to him once before with Ms. Shelton. (Tr. 1195). During the course of her testimony, Ms. Shelton admitted that she had probably "cussed him out" before. (Tr. 826 [Shelton]).

Mr. Payne was the only supervisor present at the time of the incident; the others either worked for Bob Vines or Max Boren. (Tr. 1332). He heard a "commotion out in the shop area of the building" that involved "hollering and cussing" and he specifically recalls the words "Fucking shit." (Tr. 1323-25, 1376). He testified that he had heard this type of outburst from Ms. Shelton before on at least two other occasions. (Tr. 1325-26). Instrument Technician Bryan Pemberton also overheard the incident, which he characterized as somebody "ranting and raving" and when he looked around the corner, he could see Ms. Shelton "cussing." (Tr. 1399-1400; CX 62). Mr. Pemberton described Mr. Carpenter as the "easiest target." (Tr. 1415). He recalled Joyce Lassiter, B.L. Smith, and Margaret Calger were also present. (Tr. 1406; CX 62).

Immediate Aftermath of Incident

Following the incident, Ms. Shelton went to Johnny Lynn, a union steward involved in radiation management. Mr. Lynn testified that she was "rattled, nervous, and almost crying." (Tr. 85-86 [Lynn]). He took her to "medical" where she spoke with clinical psychologist Dr. E.E. Levey about the incident. At the time she visited Dr. Levey, she was hyperventilating. (Tr. 354 [Levey]).

Mr. Carpenter testified that he commented to Tom Roberts about the incident the day it occurred and he later spoke with Bill Robbins. He recalls telling Mr. Robbins that he was upset and he probably also told him that he did not want to work with Ms. Shelton any more. That Monday morning, he told his supervisor, Max Boren, that he was considering filing a complaint. Ms. Shelton apologized to him on Tuesday morning (February 14), and he accepted her apology. (Tr. 1195-97[Carpenter]; RX 45 [Shelton Statement]). The reason he considered filing a complaint was so that he "wouldn't have to put up with this anymore." (Tr. 1202 [Carpenter]).

Mr. Roberts testified that on the date of the incident he talked to Bill Robbins about it and advised him that they would probably not do the instruments until later in the month, to give Ms. Shelton "time to get settled." (Tr. 1206). The following Monday he talked with Max Boren and told him that "Brenda had cussed Clay" and that they would probably be a little bit late doing the instruments, but that they would get done that month. (Tr. 1205-06). On Monday or Tuesday, Ms. Shelton came to him in tears and apologized, and he told her that he accepted her apology and hugged her. (Tr. 1207, 1209 [Roberts]).

When Mr. Payne returned to his office that same day, he first called Dick Hess, the section head for the group, and told him what went on. Mr. Hess said the incident

should be brought to the attention of "HP" but he was not going to do anything unless it happened again. (CX 17 [Hess Statement]). Mr. Payne then called Tom Roberts to advise him that he had reported the incident to Mr. Hess. (Tr. 1326-27 [Payne]). He testified that as the only supervisor present, he felt obligated to report the incident. His decision was also based on his feeling that nobody should have to take that kind of abuse and somebody needed to know why Ms. Shelton was so upset. He also felt that the incident was inappropriate for the workplace and people were being intimidated. When questioned about the use of profanity at Oak Ridge, he distinguished between "using a cuss word" and "cussing at somebody." (Tr. 1326-27, 1332, 1374).

William ("Bill") Robbins, an engineering technologist at the I & C Division who also reported to Max Boren, had only nine days before been promoted to weekly payroll and was assigned to work with the calibration team. (Tr. 1135,1141-43). He had specifically checked with Ms. Shelton a few days before and asked her if she would be able to green tag the instruments. (Tr. 1109-10). He testified that both Clay Carpenter and Tom Roberts complained to him about the incident on the day it occurred. Mr. Roberts told him they were going to put off the calibrations until the end of the month, and Mr. Carpenter, who was extremely upset, said he would not work with Ms. Shelton again. (Tr. 1109-11). Mr. Robbins testified that he had "two extremely upset technicians on [his] hands who were refusing to do the work" and that if the instruments were not calibrated by the end of the month, the facility would not be in compliance and could be shut down. (Tr. 1133, 1156 [Robbins]).

On the date of the incident, Mr. Robbins first telephoned Dr. Steven Sims, the Director of the whole Office of Radiation Protection. Mr. Robbins testified that he called Dr. Sims because he knew him and wanted to find out the name of Ms. Shelton's supervisor, because he had two extremely upset technicians on his hands who were refusing to do the work. He told Dr. Sims he did not want to file a complaint with him, but wanted to go through the appropriate channels. (Tr. 1111-12, 1133 [Robbins]). Dr. Sims knew Mr. Robbins because when he was a group leader in another facility, Mr. Robbins had done some work for him. According to Dr. Sims, Mr. Robbins reported that some unspecified I & C personnel had said that Ms. Shelton refused to do some of her assigned work and had "cussed out the technicians." Dr. Sims suggested that Mr. Robbins contact Lynn Sowder about having the work she was assigned completed. (Tr. 972-74 [Sims]).

Mr. Robbins next called Max Boren and advised him that Mr. Sowder was Ms. Shelton's supervisor so that Mr. Boren could contact him "supervisor to supervisor" and Mr. Boren agreed to do so. (Tr. 1111, 1158). Aside from hearing that Ms. Shelton had apologized to Mr. Carpenter and Mr. Roberts, Mr. Robbins had no further involvement. (Tr. 1158 [Robbins]). After receiving the call from Bill Robbins, Mr. Boren called his own supervisor's supervisor [Dick Hess] (because his supervisor [Byrl Adkisson] was out) and then called Lynn Sowder, and he told them both the little he knew at the time. At his supervisor's direction, he called additional people, including employees at labor

relations. (Tr. 1223-24, 1236-39, 1246-49 [Boren]; Tr. 464-65 [Sowder]). Mr. Boren also met with Mr. Carpenter and Mr. Roberts on Monday, February 13. (Tr. 1231-37 [Boren]; RX 25).

On the date of the incident, following the call from Mr. Boren (which he considered a verbal complaint) Mr. Sowder called his supervisor, John Spence, who told him to investigate the matter and keep him posted. Mr. Sowder then met separately with Clay Carpenter and Brenda Shelton. (Tr. 464-65, 472-73, 476, 521-25 [Sowder]; CX 55). Mr. Sowder told Ms. Shelton he had received a complaint about her cursing out one of the I & C technicians and asked her what happened. The meeting only lasted a few minutes. (Tr. 787-88 [Shelton])

Early the following week, Dr. Sims contacted Jerry Hunt and asked him to look into the matter. He "learned that Lynn Sowder and his immediate supervisor, John Spence, had been in contact with the I & C personnel, and that they had complained that Brenda had cussed them out" and he "also learned that some of the involved people from the I & C division had contacted the human resources department about the matter." He next contacted his administrative assistant, Leila Sutherland, and asked her to set up a meeting between him, Mr. Hunt, Ms. Shelton, and the appropriate human resources people. (Tr. 972-74 [Sims]).

After he got the call from Dr. Sims, Mr. Hunt called John Spence and asked him to look into it with the I & C personnel. (Tr. 192 [Hunt]; CX 15 at 2).

Mr. Hunt discussed the incident with Dr. Mlekodaj on one or two occasions during the course of his limited investigation. (Tr. 182-84, 193-94 [Hunt]; CX 15 at 3-4 [Hunt statement]). Dr. Mlekodaj recalls that he told Mr. Hunt that Ms. Shelton was a good, hard worker, but he also recounted "some of the problems we've had with Brenda over the years." He told Mr. Hunt about the 1995 incident involving the students, discussed above. Dr. Mlekodaj also told Mr. Hunt about the "business with the performance appraisal" and that she had misquoted him during the ***Varnadore*** case. (Tr. 123-25, 132-33, 144-49 [Mlekodaj]). Mr. Hunt recalls being told she was the technician in the ***Varnadore*** case but not that she misquoted Dr. Mlekodaj. (Tr. 265-66 [Hunt]). According to Mr. Hunt's statement, Dr. Mlekodaj said he "had sort of a shouting match with her once over a performance review" and "she had had problems with the technicians in 4500 South and they had moved her to Lynn Sowder's group." (CX 15 [Hunt statement] at 4; ***see also*** Tr. 184).[21]

Meetings with In-House Clinical Psychologist

[21] Building 4500 South was the building where Mr. Varnadore worked when he was discovered by Ms. Shelton. (RX 31 [Shelton deposition] at 7.)

During her initial consultation with him on February 10, the date of the incident, Dr. Levey wanted to figure out ways that Ms. Shelton could vent her feelings appropriately. (Tr. 362). Dr. Levey also saw her on Tuesday, February 14, when they discussed her background and work situation, and on Friday, February 17, when they discussed the meeting held on Wednesday, February 15 (discussed below). (Tr. 357; CX 12; RX 34). Dr. Levey was also contacted by Mr. Watson from labor relations on February 17, not for the purpose of determining the level of discipline, but to find out whether there was a mental health reason for not imposing discipline that management should be aware of. (Tr. 362-369 [Levey]; CX 12). Mr. Watson advised that they were considering a written reminder, noted that "I & C folks are known for confrontations," and "off the record" told him about Ms. Shelton's previous "difficulties with people." (CX 12 [Levy file]). Dr. Levey told Mr. Watson that her pneumonia, followed by a stressful work situation, were factors that should be considered, and suggested that her management be advised of the need to help her become more structured in how she approaches her work load and, if possible, give her some assistance. (Tr. 362-369 [Levey]; CX 12).[22] He never spoke with Ms. Shelton's managers and they never found out what Dr. Levey had said. (Tr. 252 [Hunt]; Tr. 358 [Levey]; CX 13 [Hunt statement]). According to Dr. Levey's office notes, Ms Shelton did not show up for a scheduled March 3, 1995 follow-up appointment. (CX 12). By letter of March 28, 1995, in response to a call from the medical department, she advised that she "believe[d] that this request for an appointment [was] an attempt to intimidate [her] because [she had] filed a 'whistle-blower' complaint with the Department of Labor against Martin Marietta Energy Systems (MMES), ORNL, and [her] management" and she advised that "if and when [she] decide[d] that [she] need[ed] or want[ed] care from a physician [she would] decide with whom and when." (CX 12 [Levey file]).

Work Force Diversity Complaint

On the Monday following the incident, February 13, Ms. Shelton met with Mylissa Craze, a program assistant in the office of Work Force Diversity and the Salaried Employee Concern Counselor at Oak Ridge National Laboratory; her office was formerly known as the Affirmative Action office. Ms. Craze is responsible for investigating and counseling salaried employees who had concerns they did not want to deal with through their management and to assist management in assuring that they were providing a diverse work place relative to their hiring and employment practices. (Tr. 164-66). Ms. Shelton told Ms. Craze about the February 10 incident, which she

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[22] Dr. Levey did not mention these comments in his May 12, 1995 statement to the Wage and Hour investigator and indicated that he had advised Mr. Watson that there were no special circumstances concerning her emotional state that management should be aware of. (CX 13). I find the contemporaneous file memorandum (CX 12) and Dr. Levey's testimony at the hearing to be more probative. In any event, Mr. Hunt testified Ms. Shelton's management never learned what Dr. Levey had said. (Tr. 252 [Hunt]; CX 13 [Hunt statement]).

attributed to "being stressed," and told her that she had "cussed out" the I & C technician. (Tr. 166, 169). She expressed concerns that there was going to be an occurrence report or a write-up involving the incomplete tasks and that there was going to be some kind of action taken against her. (Tr. 166-67). She told Ms. Craze that she thought that I & C and her management were out to get her because she was black and she later said that it was because she was involved in the Varnadore case. (Tr. 170, 174). However, the formal written complaint (discussed below with respect to the February 15 meeting) did not mention race or the ***Varnadore*** case and merely said that I & C was "out to get" her for unspecified reasons. (RX 5). Ms. Shelton signed the complaint on February 14 and spoke with Ms. Craze again on the 15th or 16th. (Tr. 167, 176). It was Ms. Craze's understanding that she would attend a meeting with her management and they would be given an opportunity to address the particular concerns that she had written up. (Tr. 168). However, when the meeting was finally held, on March 10, Ms. Craze was out sick. (Tr. 169). She never investigated Ms. Shelton's complaint, nor was it investigated by any one else from Work Force Diversity. (Tr. 168 [Craze]).

Meetings Relating to Incident

A number of meetings were held as a result of the incident, in addition to the telephone calls, interviews, and discussions mentioned above:

(1) On February 13, there was a meeting between Lynn Sowder, John Spence, James Payne, and Max Boren (Tr. 471, 526 [Sowder]; Tr. 1231-38 [Boren]; Tr. 1328-30, 32-34 [Payne]; CX 67; RX 27). It was primarily a fact finding meeting. (Tr. 1329-30 [Payne]). At that meeting, Mr. Payne suggested that this type of outburst by Ms. Shelton was a monthly occurrence.[23] (RX 27). When asked by Mr. Spence and Mr. Sowder what he wanted done about the situation, Mr. Boren stated that he "didn't want a situation like this to happen again." (Tr. 1238 [Boren]).

(2) On February 15, there was another meeting between Brenda Shelton, Jerry Hunt, John Spence, and Lynn Sowder, which focused on Ms. Shelton's use of profanity and the company's policy related thereto. (Tr. 228-29, 233-34 [Hunt]; Tr. 471, 537-40

[23] It is unclear what exact words Mr. Payne used. Although Mr. Boren's testimony (Tr. 1276-77) and statement (CX 24 at 5) indicated that Mr. Payne had stated that this type of incident occurred "about once a month" with Ms. Shelton, at the hearing Mr. Payne denied having made that statement; he agreed there were outbursts "from time to time, possibly as often as once a month," but not "somebody getting cussed out." (Tr. 1363-65 [Payne]). I find Mr. Spence's written account of the meeting that it was "perhaps a monthly occurrence" (RX 27) and Mr. Sowder's notes to the effect that "this was a monthly incident" (CX 67) to be more probative than Mr. Payne's recollection after the fact of what he actually said.

[Sowder]; Tr. 786-87, 789-93 [Shelton]; CX 11).[24] According to Mr. Hunt, the primary purpose of the meeting was to hear Ms. Shelton's side of the story, and no decision had been made at that time as to what level of discipline to impose. (Tr. 274-75 [Hunt]). At this meeting, Ms. Shelton testified that Mr. Hunt was never introduced to her, did not shake hands, and spoke loudly. (Tr. 789-93). Mr. Hunt testified that Ms. Shelton was "very hostile", admitted to the use of profanity, and threw two pieces of paper across the room, which she said was her answer. (Tr. 228-29). In the response, she admitted that "profanity was used when addressing the I&C Technician" but blamed the incident on "circumstances which I had no control over-- stress." The remainder of the memorandum focused on her complaints about her working situation and her previous difficulties with I & C and stated: " In conclusion, I have made my apologies to the I&C Technician who never filed a complaint about any of this – just I&C out to get me." (RX 5). Mr. Hunt testified that her concerns would be addressed at another meeting but that the abusive language had to stop. (Tr. 228-29; ***see also*** RX 6 [Shelton's February 15 meeting summary]; RX 28 [Hunt's February 15 meeting summary]). Ms. Shelton asked for a copy of the complaint and was told there was no written complaint. (RX 6).

(3) On Friday, February 17, there was a meeting between Mr. Hunt, Dr. Sims, Leila Sutherland, Gerald Watson, and Ron Honeycutt. Ms. Sutherland was the administrative assistant in the Office of Radiation Protection while Mr. Watson and Mr. Honeycutt were from labor relations. Mr. Watson indicated that he had been contacted by I & C management and that he had told them to contact the Office of Radiation Protection management. At the meeting, he advised those present about the 1990 janitorial incident when Ms. Shelton had "cussed in an abusive manner." It was decided that Dr. Levey should be consulted before the level of disciplinary action was determined, and Mr. Watson agreed to do so. Mr. Watson indicated he would be available to assist Mr. Sowder in dealing with Ms. Shelton's insubordination. The disciplinary action discussed was either an oral reminder or a written reminder. Mr. Watson testified that Ms. Shelton's admission of profanity was in itself a cause for discipline, that formal disciplinary action was warranted, and that coaching and counseling would not be appropriate. (CX 11; RX 27; Tr. 467, 528-29 [Sowder]; Tr. 1492-93, 1503-05, 1547, 1557-67 [Watson]).

(4) On February 23, there was a meeting between John Spence, Lynn Sowder and Brenda Shelton. At that meeting, Ms. Shelton was given the Oral Reminder by Mr. Sowder. (RX 29 [Memorandum Memorializing Oral Reminder]; Tr. 240-41 [Hunt]; Tr. 786-87, 789-93 [Shelton]). According to Mr. Sowder's account of the February 23 meeting, while Ms. Shelton stated that she had previously committed to Mr. Hunt not to

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[24] In her statement to Wage and Hour, Ms. Shelton indicates the meeting date was February 16, 1995. (RX 45). I find the typed meeting accounts to have more probative value as to the date.

use profanity or obscene language on the job during the February 15 meeting, she refused to agree not to retaliate against I & C personnel. (RX 29 [Sowder's February 23 meeting summary]; ***see also*** Tr. 254-56, 276 [Hunt]; ***compare*** RX 28 [Hunt's February 15 meeting summary]).

(5) On March 10, 1995, there was a meeting between Mr. Hunt, Mr. Sowder, Mr. Spence, Ms. Shelton, and J.D. Mayton (an employee and former ***Varnadore*** witness invited by Ms. Shelton because Ms. Craze was on vacation.) (RX 30 [Hunt notes]; CX 6, 11; Tr. 242-43 [Hunt]; Tr. 786-87, 789-93, 828-29 [Shelton]). The meeting addressed the concerns raised by Ms. Shelton at the February 15 meeting as to her work load (and particularly the fact that she did not have time to log in the routine surveys); possible solutions, including overtime, were suggested. (RX 30; Tr. 242 [Hunt]). When Mr. Hunt wanted "to discuss I&C," Ms. Shelton refused, informed him that issue would have to be discussed with her attorney, and said that she wanted to discuss the lack of management support for her. (CX 6, 11). Mr. Hunt authorized a maximum 300 hours of overtime. (CX 6). Mr. Hunt asked Ms. Shelton and Mr. Sowder to work up an overtime schedule. (CX 11).

Positive Discipline

As noted above, Ms. Shelton was given an "Oral Reminder" on February 23, 1995 due to the February 10 incident. An "Oral Reminder" is the lowest step of "formal discipline" under the Corporate Respondents' "Positive Discipline" program.[25] However, the lowest step of discipline in general is "Coaching and Counseling," and Ms. Shelton could have been given "Coaching and Counseling" (Tr. 194 [Hunt]; CX 80, 81; RX 13). An Oral Reminder is memorialized by a memorandum that remains in an employee's file for six months and then is removed; after removal it cannot be considered in connection with future disciplinary action. (Tr. 239-41 [Hunt]). In this case, the Oral Reminder was deactivated on August 23, 1995, the week before the hearing was begun. (Tr. 241 [Hunt]; 1480 [Watson]; CX 92]).

The steps of positive discipline are set forth in Martin Marietta Systems Inc. Procedure Number ESP-LR-151 (11/15/94) (RX 13)[26] and were also discussed in the videotape "Positive Discipline" (CX 102 [videotape]; CX 103 [transcript]). They consist of Coaching and Counseling, Oral Reminder, Written Reminder, Decision-Making Leave, and Termination, each of which may be given in one of three categories of employee misbehavior -- Attendance, Conduct, and Work Performance. (RX 13, p. 4-

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[25] According to the booklet appearing as CX 79, "Positive Discipline" is a registered trademark of Performance Systems Corporation.

[26] An earlier (11/20/92) edition of the Procedure (including the appendices) appears as CX 66.

5; Tr. 1657-58 [Watson]). Despite its innocuous sounding name, an Oral Reminder is a step potentially leading to termination in the event of other violations in the same category during the period that the Oral Reminder memorandum is in the employee's personnel file. (CX 80). The steps can generally not be compressed unless health and safety violations are involved. (Tr.279-80 [Hunt]). "Normally, performance, conduct, or attendance problems can be resolved at [the level of Coaching and Counseling]." (RX 13, p. 4).

The employee handbook, ***You and Martin Marietta Energy Systems, Inc.***, specifically prohibits "abusive or threatening language" (Tr. 236 [Hunt]; RX 11 (pp. 47-49).) MMC Policy PRC HR-18 (3/38/94), "Prohibition against Harassment", includes as prohibited verbal conduct:

> Profanity, offensive language, name calling, negative stereotypes or names or labels that another person can reasonably be expected to find offensive.

(RX 12, p. 1).

No records are maintained by Labor Relations concerning Coaching and Counseling, but there are records as to the formal steps of Positive Discipline. For incidents involving abusive/threatening language, a "Conduct" matter, the most common form of discipline is the issuance of an Oral Reminder and it was the form of discipline recommended by Mr. Watson. (Tr. 1503-04; RX 15, 16, 17).

The decision as to the level of discipline is made by line management, with input from labor relations. Labor relations recommended an Oral Reminder be given. (Tr. 253, 274-75 [Hunt]). Dr. Sims made the ultimate decision as to the level of discipline; he was directly involved in the case simply because it had been brought to his personal attention, he was concerned that the complaints of a customer were involved, and there was pressure to get work done. (Tr. 1001-02, 1009-10, 1072-74, 1078 [Sims]). He testified that he knew of Ms. Shelton's role in ***Varnadore***, but he felt she was doing her job as a health physics technician and did not hold it against her. (Tr. 980). According to Dr. Sims, the decision to skip the coaching and counseling step "had a lot to do with the severity," in that she had cussed out other employees in the past. (Tr. 1004). An Oral Reminder seemed to be appropriate based upon the manual and advice from human resources, and he would do the same thing again. (Tr. 1003-05, 1040, 1074-76). Dr. Sims did not consult with DOE managers concerning the actions he took with respect to Ms. Shelton and no DOE employees participated in any of the meetings he had in reaching the decision to discipline Ms. Shelton. (Tr. 1079 [Sims]).

Mr. Hunt indicated that even though Ms. Shelton had agreed not to do this anymore (***e.g.,*** RX 28, 29), additional steps were deemed necessary:

> . . . because another division had complained against it. From my understanding, I guess -- the investigation -- had this been a single instance, probably nothing would have happened.
>
> The fact that it was a multiple incident, and that it had happened multiple times and in the past led us to believe that that wasn't going to happen.

Tr. 253 [Hunt]). He also expressed concerns that Ms. Shelton did not agree not to

retaliate against the I & C personnel concerned. (Tr. 254 [Hunt]).[27] Mr. Hunt testified that Ms. Shelton's involvement in the ***Varnadore*** case had no bearing on the decision to give her an oral reminder. (Tr. 242).

Overtime and Leave

In March 1995, Ms. Shelton completed some overtime for which she was not paid. She complained by letter to Gordon Fee of the Department of Energy on April 3, 1995, and Mr. Fee referred the letter to Mr. Sowder for reply. Mr. Sowder indicated in an April 13 memorandum that the failure to pay her for overtime work on March 11 and 12 was an oversight by him which had been corrected, and he apologized for the oversight. (CX 11).

After filing the case with Wage and Hour, in April 1995, Ms. Shelton had to go to Knoxville to give a statement to the Department of Labor. Originally she was told she would have to charge her time to vacation or personal time, and she took annual leave. She complained to Joe La Grone of the Department of Energy in a letter dated April 9, 1995, which Mr. La Grone referred to Martin Marietta for reply, and which was answered by Mr. Sowder. Ultimately, the leave was changed to personal leave with pay. (CX 11). Ms. Shelton's April 5 complaint to Mr. La Grone about a discontinuance of the frisking-on-entry requirement for Building 3026-D was also referred to Mr. Sowder, who explained that, with the concurrence of DOE, the requirement had been determined to be unnecessary. (CX 11).

J.D. Mayton and James Nelson Ramsey, Varnadore Witnesses

J. D. Mayton testified that he had worked for a contractor for DOE since March 1980, that he had testified in the ***Varnadore*** case and before the Rod Nelson panel, and that he suffers from ankylosing spondylitis, which has caused physical limitations and has impaired his ability to do shift work. He also testified as to circumstances that he felt showed that he had been retaliated against as a result of his testimony, and specifically in the handling of his performance appraisals, promotions/raises, work environment, security clearance, and transportation requests. Mr. Mayton was given the impression that DOE would ensure that ***Varnadore*** witnesses would not be retaliated against, but he felt that DOE had not kept that promise. (Tr. 637-725, 1091-97 [Mayton]). Julie Dorsey, head of the analytical laboratories division, and Don

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[27] Such an agreement is not specifically required by the written procedures relating to oral reminders. ***See*** Martin Marietta Systems Inc. Procedure Number ESP-LR-151 (11/15/94) (RX 13). However, Martin Marietta Energy Systems, Inc. Policy ES-LR-400 (revised 1/23/95) requires disciplinary action to be taken against any individual who retaliates against an employee for making a report relating to company operations or prompting others to do so. (RX 14).

Robbins, director of analytical services, testified to the contrary and explained the basis for employment decisions relating to Mr. Mayton. (Tr. 1697-1713 [Dorsey]; Tr. 1713-22 [DRobbins]; CX 58). Mr. Robbins also testified that Rod Nelson from DOE asked him to look into why Mr. Mayton had not been promoted, that following inquiries he recommended that Mr. Mayton be promoted, and that thereafter Mr. Mayton was promoted, in July 1994. (Tr. 1716-18.)

James Nelson Ramsey, District Attorney General for Anderson County, Tennessee, was a previous witness under subpoena in the ***Varnadore*** case. He testified that he had learned from DOE attorney Ivan Boatner[28] at a wedding that his name was being used in multiple (eight to ten) whistleblower pleadings filed by Mr. Slavin on behalf of employees. Thereafter, he wrote a letter to Mr. Slavin, with a copy to Mr. Boatner, and he has not returned phone calls by Mr. Slavin. General Ramsey has known Mr. Boatner for 20 years (Tr. 1437-54; CX 63 [excerpts from pleadings]).

U.S. Department of Energy

Lois J. Jago, Chief, Personnel and Management Analysis Branch, Department of Energy, Oak Ridge Operations Office (the DOE personnel officer for Oak Ridge operations and for the Office of Scientific and Technical Information), testified that Brenda Shelton was not an employee of the U.S. Department of Energy and that, under the contract between DOE and Lockheed Martin, employees of the contractor are not deemed to be employees of DOE or of the Government. She further testified that DOE had no authority to discipline or terminate Ms. Shelton, that no one in her office participated in the discipline of Ms. Shelton, and that DOE did not issue personnel orders applicable to Energy Systems. DOE 1, a list of DOE employees of Oak Ridge operations and the Office of Scientific and Technical Development, and DOE 2, excerpts from the contract (Modification No. M066) were admitted into evidence. (Tr. 1176-1188). Ms. Shelton is **not** listed on DOE 1.

DOE 2 [the contract excerpts] stated that a full-time supervising representative of the Contractor, approved by DOE, would be "in direct charge of the work and services covered by th[e] contract," that the work would be "subject to the general control of DOE," that the Contractor would be responsible for the employment of all professional, technical, skilled and unskilled personnel and their training," and:

> . . . .Persons employed by the Contractor shall be and remain employees of the contractor and shall not be deemed employees of DOE or the Government. . . .

[28] This name was mistranscribed by the court reporter as "Bogner."

(DOE 2 at 13.) Section H, Special Contract Requirements, provides that work under the contract is subject to the written technical direction of DOE Contracting Officer's Representatives (CORs), which may include shifting work emphasis between work areas or tasks but may not include the assignment of additional work. (DOE 2 at 21-22).

On cross examination, Ms. Jago acknowledged that the contractor facility was Government owned; that DOE owned the land, the buildings, and the tools; and that DOE made some rules in some aspects of operations. (Tr. 1185). Dr. Mlekodaj and Mr. Mayton made similar statements when they testified, and these matters are not in dispute. (Tr. 146-57 [Mlekodaj]; Tr. 664-66 [Mayton]).

With respect to security clearances, Mr. Mayton noted that DOE revokes security clearances, and Ms. Dorsey also testified that DOE grants security clearances and has the authority to revoke them. (Tr. 664-66 [Mayton]; Tr. 1705 [Dorsey]). However, Ms. Jago testified that DOE does not look at job performance in deciding whether to grant security clearances. (Tr. 1182-83). Mr. Mayton did not implicate DOE as making alleged threats to revoke his security clearance but stated that Mr. LaGrone had sent a letter to Martin Marietta telling them not to threaten employees' security clearances when they voiced concerns. (Tr. 649-51).

Mr. Hunt testified that a DOE Order requires occurrence reporting for events concerning the health and safety of workers, the environment, and national security, but the Order does not detail how Ms. Shelton is to perform her work on a daily basis. (Tr. 245). Similarly, Mr. Sowder testified that audits were conducted by DOE periodically to protect workers from radiological hazards. (Tr. 556-57.) However, Mr. Sowder testified that in addition to routine work, Ms. Shelton's work is assigned to her by Energy Systems personnel and he has no knowledge of DOE managers assigning her any work. (Tr. 635-36).

Ms. Shelton testified that DOE controls Lockheed Martin, and if DOE says "Jump", Lockheed Martin says, "How high?" (Tr. 896). She also testified that DOE controls the paperwork. (Tr. 897 [Shelton]). However, her attempts to involve DOE in her own personnel matters were unsuccessful, as in each instance DOE forwarded her correspondence to Lockheed Martin for action and she received a response from Mr. Sowder, as discussed above. (CX 11).

No DOE employees were present at any of the meetings involving the February 10 incident, nor did any DOE manager or personnel representative participate in the decision to discipline Ms. Shelton. (***E.g.,*** Tr. 244-45 [Hunt]; Tr. 555-56 [Sowder]; Tr. 1373 [Payne]).

An investigation conducted by the Oak Ridge Field Office of DOE (conducted at the behest of Joe La Grone, manager of that office) in response to media attention

arising out of the ***Varnadore*** case, under Rodney R. Nelson, Chairman produced a July 1992 report [the "Nelson Report"] that appears as CX 1. Ms. Shelton was among those questioned. (Tr. 747-50). The Nelson Report found evidence of retaliation by Energy Systems management and an atmosphere that fostered the perception of retaliation. (CX 1 at 3).

Don Robbins, director of analytical services, testified that DOE ordinarily does not contact Lockheed Martin about promotions. However, in the case of J.D. Mayton, ***Varnadore*** witness, Rod Nelson from DOE looked into the fact that Mr. Mayton's promotion did not go through. (Tr. 1717, 1721 [DRobbins]).

William H. Webster and the law firm of Milbank, Tweed, Hadley & McCloy investigated some of Charles Varnadore's allegations and prepared a report dated September 21, 1992 [the "Webster Report."] Although finding no "generic pattern" of retaliation, the Webster report also expressed concern about the perception by employees that retaliation for outspoken behavior had occurred in the past and would continue to occur. The report stated that the working relationship between the Department of Energy and Energy Systems was "unusual" and "leaves much to be desired." The report was especially critical of the investigation by the Oak Ridge Field Office, which produced the Nelson Report, because the investigators inquired into the personal life of employees and did not confine their inquiry to health and safety matters, thereby "further damag[ing] the Department of Energy's credibility as an objective manager of the Oak Ridge sites." (CX 5 at 5-7, 201-02, 215-16).

Complainant's Exhibits 105 and 106 indicate that Lockheed Martin hired Joe La Grone, the former DOE manager, as Director of DOE programs for Lockheed Matin Advanced Environmental Systems in October 1997 following his 1995 retirement from DOE.

DISCUSSION

Applicable Law

As discussed above, the instant case has been brought under the employee protection provisions of three environmental statutes (the Clean Air Act, the Solid Waste Disposal Act, and CERCLA) and the Energy Reorganization Act, and the Toxic Substances Control Act (TSCA) with respect to the claims against DOE and Dr. Shults. These "whistleblower" provisions are designed to "protect employees from retaliation for protected activities such as complaining, testifying, or commencing proceedings against an employer for a violation of one of these federal statutes." ***Devereux v. Wyoming Association of Rural Water,*** 93-ERA-18 (Sec'y, October 1, 1993). The employee protection provisions have been construed broadly to afford protection for participation in activities in furtherance of the statutory objectives. ***See Tyndall v. U.S.***

Environmental Protection Agency, 93-CAA-6, 95-CAA-5 (Administrative Review Board, June 14, 1996).

The Clean Air Act's (CAA's) employee protection provision provides, in relevant part:

> **(a) Discharge or discrimination prohibited**
>
> No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) --
>
> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration of enforcement of any requirement imposed under this chapter or under any applicable implementation plan,
>
> (2) testified or is about to testify in any such proceeding, or
>
> (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this Act.

42 U.S.C. § 7622. Similar wording appears in this provision's counterpart in the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2622.

The analogous provision appearing in CERCLA provides:

> No person shall fire or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has provided information to a State or to the Federal Government, filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

42 U.S.C. § 9610(a). A substantially similar provision (not including the reference to providing information to a State or the Federal Government) appears in the Solid Waste Disposal Act, 42 U.S.C. § 6791(a).

To establish a ***prima facie*** case of a violation of the CAA's employee protection provision (which is analogous to the other environmental statutes), a complainant must show that he engaged in protected activity of which the respondent was aware and that the respondent took adverse action against him, and he must raise the inference that the protected activity was the likely reason for the respondent's adverse action against him. ***Tyndall v. U.S. Environmental Protection Agency,*** 93-CAA-6, 95-CAA-5 (Administrative Review Board, June 14, 1996); ***Jackson v. The Comfort Inn, Downtown,*** 93-CAA-7 (Sec'y, March 16, 1995). Temporal proximity may be sufficient to raise the inference that a respondent's adverse actions were taken in retaliation for a complainant's protected activities. ***Tyndall, supra***, ***citing Couty v. Dole,*** 886 F.2d 147, 148 (8th Cir. 1989). ***See also Simon v. Simmons Foods, Inc.,*** 49 F.3d 386, 389 (8th Cir. 1995). Once an employer has established a ***prima facie*** case of discrimination, the respondent has the burden of producing evidence that the adverse action was motivated by legitimate, nondiscriminatory reasons. The complainant, as the party bearing the ultimate burden of persuasion, must then show that the proffered reason was not the true reason, but was a pretext for retaliation. In this regard, the complainant always bears the burden of proving by a preponderance of the evidence that retaliation was a motivating factor in the respondent's actions. ***Jackson, supra.*** Once the employee has shown that illegal motives played some part in the discharge, the employer must prove that it would have discharged the employee even if he had not engaged in protected conduct. In such "dual motive" cases, the employer bears the risk that the influence of legal and illegal motives cannot be separated. ***Pogue v. U.S. Department of Labor,*** 940 F.2d 1287 (9th Cir. 1991).

The environmental statutes do not specifically define "employer." A party may be held liable as an employer for retaliating against an employee "if it ha[s] acted as an employer with regard to the employee, ***e.g.,*** by establishing, modifying or interfering with the employee's compensation, terms, conditions or privileges of employment." It may also be deemed an employer if it has exercised control over production of the work product. ***Stephenson v. National Aeronautics & Space Administration,*** 94-TSC-5 (Administrative Review Board, April 7, 1997) (Order) (Clean Air Act case). ***See also Varnadore v. Oak Ridge National Laboratory (Varnadore I, II, and III),*** 92-CAA-2 to 95-ERA-1 (Administrative Review Board, June 14, 1996) ***petition for review filed,*** No. 96-3888 (6th. Cir. Aug. 13, 1996).

Although not dissimilar to their counterparts in the environmental statutes, the employee protection provisions of the Energy Reorganization Act (ERA) are somewhat broader:

> **(a) Discrimination against employee**
>
> (1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of

> employment because the employee (or person acting pursuant to a request of the employee) --
>
> (A) notified his employer of any alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.);
>
> (B) refused to engage in any practice made unlawful by this chapter of the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer;
>
> (C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or the Atomic Energy Act of 1954;
>
> (D) commenced, caused to be commenced, or is about to commence a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;
>
> (E) testified or is about to testify in any such proceeding, or;
>
> (F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended.

42 U.S.C. § 5851(a)(1). Subsection (a)(2) of the same section defines "employer" to include a licensee of the Nuclear Regulatory Commission or an agreement state, an applicant for a license, a contractor or subcontractor of a licensee or applicant, and "a contractor or subcontractor of the Department of Energy that is indemnified by the Department under section 170 d. of the Atomic Energy Act of 1954 (42 U.S.C. 2210(d), but such term shall not include any contractor or subcontractor covered by Executive Order No. 12344." 42 U.S.C. § 5851(a)(2).

Subsection (b), which was amended in 1992, sets forth specific procedures for addressing "whistleblower" complaints filed under the ERA and provides for burdens of proof unique to the ERA. Specifically, subparagraph (B) of subsection (b)(2) specifies the relief to be ordered if the Secretary finds a violation of subsection (a). Subparagraph (A) of subsection (b)(3) provides that the complaints shall be dismissed unless the complainant has made a prima facie showing that the behavior complained of was a contributing factor in the unfavorable personnel action alleged in the complaint

and subparagraph (B) of subsection (b)(3) provides that no investigation shall be conducted if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior. The criteria for ultimately prevailing is set forth in subparagraphs (C) and (D) of subsection (b)(3):

> (C) The Secretary may determine that a violation of subsection (a) of this section has occurred only if the complainant has demonstrated that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) of this section was a contributing factor in the unfavorable personnel action alleged in the complaint.
>
> (D) Relief may not be ordered under paragraph (2) [of subsection (b)] if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior.

42 U.S.C. § 5851(b)(3).

To establish a ***prima facie*** case under the ERA, a complainant must establish "that he engaged in protected activity, that he was subjected to adverse action, that the respondent was aware of the protected activity when it took the adverse action, and that the adverse action was retaliatory in response to the protected activity." ***Fugate v. Tennessee Valley Authority,*** 95-ERA-50 (Administrative Review Board, Dec. 12, 1996) ***citing Zinn V. University of Missouri,*** 93-ERA-34, 93-ERA-36 (Sec'y, Jan. 18, 1996). ***Compare Remusat v. Bartlett Nuclear, Inc.,*** 94-ERA-36 (Sec'y, Feb. 26, 1996) (listing final element as "to present evidence sufficient to raise the inference that the protected activity was the likely reason for his termination," as in cases under the environmental statutes discussed above) ***See also Bartlik v. U.S. Department of Labor,*** 73 F.3d 100 n. 6 (6th Cir. 1996) (listing different standards applied by Courts and finding "slight variation," in that "the common thread is that plaintiff must set forth facts which justify an inference of retaliatory discrimination"). The Secretary has found that the 1992 amendment of the statute, to require that the behavior complained of was a "contributing factor" rather than a "motivating factor" (the previous standard applicable to ERA cases, as set forth in ***Mt. Healthy City School District Board of Education v. Doyle,*** 429 U.S. 274 (1977)), did not lessen the complainant's initial burden. ***See Remusat , supra,*** slip op. at 2-3, ***citing Dysert v. Florida Power Corp.,*** 93-ERA-21 (Sec'y, August 7, 1995), ***aff'd sub nom Dysert v. Secretary of Labor***, 105 F.3d 607 (11th Cir. 1997). In ***Dysert,*** the Court of Appeals for the Eleventh Circuit found that the complainant must prove by a preponderance of the evidence that his protected activity was a contributing factor in the employer's adverse action, in order to establish a ***prima facie*** case. ***See also Trimmer v. Los Alamos National Laboratory,*** 93-CAA-9,

93-ERA-55 (Administrative Review Board May 8, 1997), ***appeal docketed*** No. 97-9544 (10th Cir. 1997);[29] ***Fugate , supra.***

If the complainant successfully establishes a ***prima facie*** case, the respondent must produce evidence of a legitimate, nondiscriminatory basis for the adverse action, and the factfinder must determine whether the complainant has borne his burden of proving, by a preponderance of the evidence, that the reasons proffered were not the true basis for the adverse action, but were a pretext for discrimination. ***Remusat,*** slip op. at 5-6.[30] If the complainant proves illegal motive (through evidence directly reflecting the use of an illegitimate criterion in the challenged decision),[31] the case is a "dual motive" or "mixed motive" case, and the burden shifts to the respondent to demonstrate by clear and convincing evidence that it would have taken the same action in the absence of protected activity. ***Talbert v. Washington Public Power Supply Systems,*** 93-ERA-35 (Administrative Review Board, Sept. 27, 1996); ***Remusat,*** slip op. at 3-4.[32] The "clear and convincing evidence" standard only applies if the evidence establishes that both legitimate and discriminatory factors contributed to the decision to take the adverse action. ***Remusat,*** slip op. at 3-4. While not defined in the statute, courts have characterized clear and convincing evidence as a heightened burden of proof -- more than a mere preponderance of the evidence but less than evidence meeting the "beyond a reasonable doubt" standard. ***Id., citing Yule v. Burns***

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[29] ***Trimmer*** was only decided under the ERA, as the actions under the environmental statutes were time barred.

[30] Cases decided before the 1992 amendments became effective held that the complainant's burden to establish pretext may be met, directly, if the complainant has shown that the unlawful reason more likely motived the employer or, indirectly, if he has shown that the employer's proffered explanation is not credible. ***See Shusterman v. Ebasco Services, Inc.,*** 87-ERA-27, slip op. at 4 (Sec'y, Jan. 6, 1992), ***aff'd*** 978 F.2d 707 (2d Cir. 1992); ***Dartey v. Zack Co.,*** 82-ERA-2, slip op. at 5-6 (Sec'y, Apr. 25, 1983).

[31] In the context of discrimination cases, "direct evidence" (as opposed to circumstantial evidence) has been defined by the Sixth Circuit as evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor. ***See Bartlik v. U.S. Department of Labor,*** 73 F.3d 100, n. 5 (6th Cir. 1996).

[32] At first blush, the Secretary's decision in ***Remusat*** and the Administrative Review Board's decision in ***Talbert*** appear to be somewhat inconsistent. ***Talbert*** implies that the pretext analysis is inapplicable in a dual or mixed motives case, whereas ***Remusat*** suggests that the facts be analyzed first under a pretext analysis, and then, if the complainant has established an illegal motive, the dual or mixed motives analysis should be applied. These cases may perhaps be reconciled because a complainant may establish a ***prima facie*** case indirectly (through the use of inferences) or rebut a proffered pretext indirectly (through an attack on credibility), whereas illegal motivation must be established directly in order to give rise to a mixed motives case. ***See generally Talbert, supra.*** See footnote 30, ***supra.***

International Security Service, No. 93-ERA-12 (Sec'y, May 24, 1995). ***See also White v. Turfway Park Racing Ass'n,*** 909 F.2d 941, 944 (6th Cir. 1990), ***citing Street v. J.C. Bradford & Co.,*** 886 F.2d 1472, 1479 (6th Cir. 1989).

Claim against Wilbur D. Shults

As noted above, a Stipulation of Dismissal under Rule 41(a)(1)(ii) was filed by the respective attorneys for Brenda W. Shelton and W.D. Shults on August 30, 1995, having been received by the undersigned administrative law judge at the hearing on that date. Under Rule 41(a)(1)(ii), Federal Rules of Civil Procedure, an action may be dismissed by a plaintiff without order of court by filing a stipulation of dismissal signed by all parties who have appeared in the action.[33] This particular rule of the Federal Rules of Civil Procedure is applicable pursuant to 29 C.F.R. § 18.1(a) because there is no provision relating to voluntary dismissals that do not involve settlements under 29 C.F.R. Parts 18 or 24. No settlement is involved here.

Although the respondents besides Dr. Shults did not execute the Stipulation, I find that it nevertheless was effective as the other parties did not contest Dr. Shults' dismissal, they were in no way prejudiced by his dismissal, and the dismissal does not involve a settlement. (Tr. 28-31, 725-26; Transcript of August 22, 1995 telephone conference at 8 to 11, 107; Transcript of August 24, 1995 telephone conference at 133-37). I also note that none of the parties except for the Complainant appealed the dismissal of Dr. Shults as a party by Wage and Hour, and none of the other respondents filed the functional equivalent of an answer with respect to the claim against Dr. Shults.

To the extent that any further action may be deemed necessary, I hereby recommend that the motion to dismiss filed by Wilbur D. Shults be granted and that Dr. Shults be dismissed as a party. In this regard, as stated in the paragraphs 2 and 6 of the Declaration of W.D. Shults submitted in support of his motion to dismiss, Dr. Shults retired on December 31, 1994, prior to the events giving rise to this action, and he never supervised Ms. Shelton or had any control over her work. Accordingly, he has not been shown to be the Complainant's employer under the pertinent statutes. ***See Stephenson v. National Aeronautics & Space Administration,*** 94-TSC-5 (Administrative Review Board, April 7, 1997) (Order) (Clean Air Act case); 42 U.S.C. § 5851(a)(2) (ERA definition of employer). ***See also Reid v. Methodist Medical Center of Oak Ridge,*** 93-CAA-4 (Sec'y, April 3, 1995), ***aff'd*** 106 F.3d 401 (6th Cir. 1996) (unpublished); ***Freels v. Lockheed Martin Energy Systems, Inc.,*** 94-ERA-6, 95-CAA-2 (Administrative Review Board, Dec. 4, 1996); ***Varnadore v. Oak Ridge National Laboratory (Varnadore I, II and III),*** 92-CAA-2 to 95-ERA-1 (Administrative Review Board, June 14, 1996), ***petition for review filed,*** No. 96-3888 (6th Cir. Aug. 13, 1996). Also, following a full evidentiary hearing, there has been no evidence introduced to suggest that, notwithstanding his involvement in the ***Varnadore*** case, Dr. Shults

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[33] Subsection (ii) of Rule 41(a)(1) is applicable rather than subsection (i) because Dr. Shults filed a dispositive motion. Subsection (i) is only applicable where the adverse party has not yet filed an answer or a motion for summary judgment (or their functional equivalent).

played any part in any of the activities giving rise to Ms. Shelton's Complaint, and I recommend that he be dismissed on that basis as well.

Claim against U.S. Department of Energy

The U.S. Department of Energy also filed a motion to dismiss prior to trial, on August 10, 1995. The motion was based upon the argument that this tribunal lacks jurisdiction as to DOE because (1) for purposes of the employee protection provisions of the environmental statutes the Complainant has never been employed by DOE and (2) DOE is not an employer under the employee protection provisions of the Energy Reorganization Act. Although I have previously indicated to the parties that the motion appeared to be meritorious, because of the possibility that additional facts might arise implicating DOE as an "employer", I decided to rule upon DOE's claim along with the claims against the other parties, after development of a full evidentiary record. I now find that the complaint against Department of Energy should be dismissed for lack of subject matter jurisdiction as the Complainant has not established that DOE is her "employer" under the applicable statutes and, with respect to the ERA, there has been no waiver of sovereign immunity.

At the outset, I find that DOE should be dismissed as a party under the ERA and the TSCA because DOE has not waived its sovereign immunity. However, the Secretary has held that the United States has waived sovereign immunity under the other environmental statutes concerned here -- CERCLA, the Solid Waste Disposal Act, and the Clean Air Act. ***See, e.g., Kesterson v. Y-12 Nuclear Weapons Plant,*** 95-CAA-0012, n. 1 (Administrative Review Board, April 8, 1997) (quoting decision of administrative law judge), ***citing Jenkins v. Environmental Protection Agency***, 92-CAA-6 (Sec'y, May 18, 1994); ***Marcus v. Environmental Protection Agency,*** 92-TSC-5 (Sec'y, Feb. 7, 1994); ***and Pogue v. U.S. Department of the Navy,*** 87-ERA-21 (Sec'y, May 10, 1990) [***rev'd on other grounds,*** 940 F.2d 1287 (9th Cir. 1991)]. In addition, DOE does not fit the ERA definition of "employer" set forth in 42 U.S.C. § 5851(a)(2), as it is not licensee of the Nuclear Regulatory Commission or an agreement state, an applicant for a license, a contractor or subcontractor of a licensee or applicant, or a contractor or subcontractor of the Department of Energy. ***See also Varnadore v. Oak Ridge National Laboratory (Varnadore I, II, and III),*** 92-CAA-2 to 95-ERA-1 at 33-35 (Administrative Review Board, June 14, 1996), ***petition for review filed,*** No. 96-3888 (6th Cir. Aug. 13, 1996).

With respect to the environmental statutes, the Complainant has not made a ***prima facie*** case against DOE on the issue of an employer/employee relationship and this case should be dismissed on that basis. ***See Reid v. Methodist Medical Center of Oak Ridge,*** 93-CAA-4 (Sec'y, April 3, 1995), ***aff'd*** 106 F.3d 401 (6th Cir. 1996) (unpublished); ***Stephenson v. National Aeronautics & Space Administration,*** 94-TSC-5 (Administrative Review Board, April 7, 1997) (Order); ***Freels v. Lockheed Martin Energy Systems, Inc.,*** 94-ERA-6, 95-CAA-2 (Administrative Review Board,

Dec. 4, 1996); ***Varnadore I, II and III, supra.*** Moreover, even assuming, ***arguendo,*** the existence of an employer/employee relationship, the Complainant has failed to establish that DOE took any adverse action against her.

In ***Stephenson,*** the Administrative Review Board (ARB) set forth the criteria for determining whether a party is an "employer" within the meaning of the environmental statutes. It acknowledged that an employment relationship between the complainant and the employer is essential in any whistleblower case, but it found that the employment relationship may extend beyond the immediate employer (1) when a contracting agency cancels a contract in retaliation for disclosure of safety problems, thereby disemploying the contractor's employees (***citing Hill v. TVA and Ottney v. TVA,*** 87-ERA-23/24 (Sec'y, May 24, 1989)) and (2) when the agency acted as an employer with regard to the complainants, "whether by exercising control over production of the work product or by establishing, modifying or interfering with the terms, conditions or privileges of employment" (***citing Robinson v. Martin Marietta Services, Inc.,*** 94-TSC-7 (Administrative Review Board Sept. 23, 1996) and ***Reid, supra.***) At footnote 4 of the decision, the ARB noted that the ***Reid*** factors for determining the degree of control (which are based upon the "right to control the manner and means by which the product is accomplished" test in ***Nationwide Mutual Ins. Co. v. Darden***, 503 U.S. 318 (1992)) included "the level of skill required, the source of instrumentalities and tools, work location, the hiring party's right to assign additional projects, the hiring party's discretion in scheduling work, the hired party's role in hiring and paying assistants, provision of employee benefits, and tax treatment." The ARB upheld its earlier decision, which had vacated the administrative law judge's decision and remanded the case.

Here, while the Complaint has made various allegations against DOE which have been expanded upon during the course of the proceedings before me and has requested expansive relief involving DOE, there has been no allegation or showing of specific involvement by DOE in any employment decisions relating to Ms. Shelton. In this regard, the Complaint has merely stated with respect to DOE that DOE has failed to take steps to prevent retaliation against Ms. Shelton, that the adverse actions against her were "materially aided by the lack of persistence on the part of DOE," that DOE failed to prevent a hostile working environment toward protected activity, and that DOE is a "partner of MMES" rather than a regulatory agency and has "lost the initiative after its initial proactive response to the Varnadore I case" (Complaint ¶¶ 23, 27, 30, 32, 40). Now, Complainant is relying upon allegations of "significant encouragement" by DOE as well as the unsupported assertion that DOE and Energy Systems are "joint employers." Ms. Shelton's Posthearing Brief at p. 88. These vague allegations of nonfeasance show that DOE did not assert control over Ms. Shelton in the performance of her work and has not established, modified or interfered with the terms, conditions or privileges of employment. Indeed, Complainant appears to be complaining that DOE was not more involved. None of the allegations meet the ***Reid/Darden*** test.

Moreover, despite the full evidentiary record developed, the Complainant has failed to show that DOE has exercised sufficient control over the manner and means of work or interfered with the terms, conditions or privileges of her employment so as to give rise to an employer/employee relationship. It is undisputed that DOE is not Ms. Shelton's direct employer, as Ms. Jago testified and as the Contract provides. It is also undisputed that DOE owns the Oak Ridge facilities and has general control over the work performed through its contract with Lockheed Martin, the performance of which is subject to its technical direction. However, there has been no showing that DOE is in any way involved in the specific assignment of work or performance thereof by Ms. Shelton or her coworkers, nor has DOE been shown to have participated in personnel matters or benefits of employment. While DOE has control over security clearances, its decision with respect to such clearances is unrelated to work performance.

In ***Freels,*** a "whistleblower" case brought by another ***Varnadore*** witness alleging retaliation for testimony given, the Administrative Review Board upheld the dismissal of DOE as a respondent, when the complainant did not allege DOE interfered with the contract or caused Energy Systems to take adverse action against her. The ARB found that DOE was entitled to judgment as a matter of law because DOE "is not Freels' employer and Freels did not allege that DOE interfered in her employment at Energy Systems." ***Id.*** at 9-10. For the same reasons, the complaint should be dismissed here.

In this regard, Ms. Shelton has not alleged DOE's specific involvement in any adverse action against her, nor does the record support an inference of such action. The record shows that DOE personnel did not attend any of the pertinent meetings and were not consulted concerning what action should be taken as a result of Ms. Shelton's profanity. In fact, each time that Ms. Shelton attempted to involve DOE in her personnel matters, her correspondence was referred to her supervisor at Energy Systems for action. There is no basis for implicating DOE in the actions that gave rise to Ms. Shelton's complaint.

Claim against Corporate Respondents

The Complainant has named Oak Ridge National Laboratory; Lockheed Martin Energy Systems, Inc.; Martin Marietta Corporation; Martin Marietta Technologies, Inc.; and Lockheed Martin Corporation as respondents. However, although it is undisputed that Lockheed Martin Energy Systems, Inc. ("Energy Systems") is the Complainant's employer, the Complainant has failed to establish that the other Lockheed Martin entities constitute her "employers" within the meaning of the applicable statutes, discussed above, or to assert a basis upon which such a finding could be made. ***See Reid v. Methodist Medical Center of Oak Ridge,*** 93-CAA-4 (Sec'y, April 3, 1995), ***aff'd*** 106 F.3d 401 (6th Cir. 1996) (unpublished); ***Stephenson v. National Aeronautics & Space Administration,*** 94-TSC-5 (Administrative Review Board, April 7, 1997) (Order); ***Freels v. Lockheed Martin Energy Systems, Inc.,*** 94-ERA-6, 95-CAA-2 (Administrative Review Board, Dec. 4, 1996); ***Varnadore v. Oak Ridge National***

Laboratory (Varnadore I, II, and III), 92-CAA-2 to 95-ERA-1 (Administrative Review Board, June 14, 1996) ***petition for review filed,*** No. 96-3888 (6th Cir. Aug. 13, 1996) . The Complainant has also failed to establish that Oak Ridge National Laboratory would qualify as her "employer" or that it is a suable entity. ***Id.*** Accordingly, the Corporate Respondents with the exception of Energy Systems should be dismissed.

In ***Freels,*** a case brought by another ***Varnadore*** witness against some of the same parties involved here, the Administrative Review Board found that Martin Marietta Corporation (now Lockheed Martin Corporation) and Martin Marietta Technologies, Inc. (now Lockheed Martin Technologies) were properly dismissed as respondents since the complainant did not allege that these corporations employed her and they are merely parent companies of Energy Systems. The Board also found that Oak Ridge National Laboratory was properly dismissed, because it is an unincorporated division of Energy Systems and is not a legal entity.

Similarly, in ***Varnadore I, II , and III,*** the Administrative Review Board held that the ALJ had correctly dismissed all claims against the Lockheed Martin respondents except for Energy Systems. In this regard, it found Oak Ridge National Laboratory to be an unincorporated division of Energy Systems and not a legal entity that could be sued, and it noted that Lockheed Martin and Lockheed Martin Technologies "are not alleged to have employed Varnadore and are merely parent companies of Energy Systems." ***Id.*** at 36. For the same reasons, these parties should be dismissed here.

Claim against Energy Systems

Although the Complainant has asserted a number of claims against Energy Systems, there are only two which merit discussion -- (1) her claim that she was retaliated against because of her participation in the ***Varnadore*** case and related matters and (2) her claim that she was retaliated against because of her health physics activities with respect to the Instrumentation and Control ("I & C") division. The remainder of Complainant's claims either are interrelated with and inseparable from these two claims, lack substance, and/or are time barred and do not warrant further

discussion.[34] For the reasons set forth below, I find that each of these two claims ultimately fails under both the environmental statutes and the ERA.

Varnadore Case

Ms. Shelton's main contention is that her involvement in the ***Varnadore*** case (and related activities, such as her appearance before the Rod Nelson panel) was protected activity and that the Oral Reminder was given to her in retaliation for that protected activity.[35] The Corporate Respondents agree that Ms. Shelton's involvement in the ***Varnadore*** case was "protected activity under the statutes referred to in the charge" but deny that the Oral Reminder was given because of the protected activity or that the protected activity was a contributing factor. The Lockheed Martin Respondents' Proposed Findings of Fact and Conclusions of Law with Brief in Support at p. 9. As each of the statutes involved here was also an alleged basis for jurisdiction in the ***Varnadore*** case, the Complainant has established that she engaged in protected activity under each of the statutes based upon her testimony given in ***Varnadore***. It does not matter whether jurisdiction was appropriately premised on each of the environmental statutes and the ERA in ***Varnadore*** and it does not matter whether Mr. Varnadore's case was meritorious or whether he ultimately prevailed. Further, it is apparent that Energy Systems was aware of her protected activity, through its managers. Although Ms. Shelton was not terminated, it is also clear that the decision to impose formal discipline, and the issuance of an Oral Reminder in implementation of that decision, was an adverse personnel action, in that the Oral Reminder was the first step in a course of disciplinary action that could ultimately lead to her removal. ***See generally Helmstetter v. Pacific Gas and Electric,*** 86-SWD-2 (Sec'y, Sept. 9, 1992).

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[34] For example, any claims based upon alleged race discrimination are not actionable under the ERA or the environmental statutes. ***See, e.g., DeCresci v. Lukens Steel Co.,*** 87-ERA-13 (Sec'y, Dec. 16, 1993). Any claim based upon Ms. Shelton's alleged ostracism in the workplace is speculative and lacks evidentiary support, apart from the testimony of a single instrument technician who apparently is now uncomfortable around her as a result of the instant suit. See Ms. Shelton's Proposed Findings of Fact and Conclusions of Law at p. 136. Finally, any claim based upon Ms. Shelton's PPR in 1992 and her transfer is time barred. ***See Varnadore v. Oak Ridge National Laboratory (Varnadore I, II, and III),*** 92-CAA-2 to 95-ERA-1 (Administrative Review Board, June 14, 1996) ***petition for review filed,*** No. 96-3888 (6th Cir. Aug. 13, 1996). As shown above, Dr. Swanks exhibited the wisdom of Solomon in his handling of this situation and he may have averted an earlier law suit.

[35] I do not find Ms. Shelton's complaints concerning how she was treated during the period from the cussing incident until after the issuance of the Oral Reminder (such as her complaints concerning the meetings held) to constitute a separate cause of action, as these activities are interrelated. However, only the Oral Reminder would qualify as an adverse action.

Thus, the issue is whether the adverse action was taken against her because of her protected activity.

The actual decision as to the level of discipline (or whether any disciplinary action should be taken) was made by line management (specifically, Mr. Hunt and Dr. Sims), with input from labor relations/human resources (Mr. Watson and Mr. Honeycutt). (Tr. 253 [Hunt]). Mr. Sowder, while involved in investigating the incident, did not take an active role in deciding whether or how Ms. Shelton would be disciplined; he clearly was happy to leave that matter to his superiors. Because of his direct involvement, based upon mere happenstance (his prior association with Bill Robbins), Dr. Sims made the ultimate decision as to the level of discipline. In deciding what type of discipline, or whether there should be any discipline at all, Dr. Sims and Mr. Hunt consulted with personnel from I & C and with Dr. Mlekodaj, as well as with human resources.

I find, based upon a review of the record, that none of the managers from the Office of Radiation Protection who were involved in disciplining Ms. Shelton, except for Dr. Mlekodaj, in any way held her participation in the ***Varnadore*** case against her. Basically, the sentiment on the part of her superiors at Energy Systems was, as Dr. Sims testified, that she was just doing her job as a health physics technician by taking readings. (Tr. 980 [Sims]; 241-42 [Hunt]). The personnel from I & C also did not take her participation in the ***Varnadore*** case into account, as they generally were either unaware of it or were uncertain as to what her role was. Her former supervisor, Dr. Mlekodaj, also does not appear to have held Ms. Shelton's participation as a health physics technician in the ***Varnadore*** case against her, but I find that he did have antagonism toward her because he believed that she misquoted him. I also find that Dr. Mlekodaj's antagonism toward Ms. Shelton as a result of her testimony contributed to the issuance of the Oral Reminder. In this regard, Mr. Hunt consulted Dr. Mlekodaj in the course of obtaining information as a part of his limited investigation into the pertinent facts and he was aware that Dr. Mlekodaj was her previous supervisor. Although complimenting her work, Dr. Mlekodaj referred to a history of difficulties Ms. Shelton had dealing with people when she worked for him -- the incident with the students, her problems with personnel in the building where she worked when she discovered Mr. Varnadore, and the shouting match he had with her over her performance appraisal. These negative comments were taken into consideration by Mr. Hunt and Dr. Sims and clearly contributed to the likelihood that formal disciplinary action would be taken against her and that she would at least be issued an Oral Reminder, the lowest form of formal "positive discipline." Thus, I find and determine that Ms. Shelton has established a ***prima facie*** case under both the environmental statutes and the ERA.

As the Complainant has established a ***prima facie*** case, the Employer must produce evidence of a legitimate, nondiscriminatory basis for the adverse action. It has done so here. Ms. Shelton's use of profanity and abusive language was in specific

contravention of Lockheed Martin's office procedures and was clearly a basis for disciplinary action. Indeed, as Mr. Watson testified, formal discipline, and specifically the issuance of Oral Reminders, had been implemented in multiple other cases involving the use of profane and/or abusive language and he so advised line management, who took his advice into consideration in making their decision. He also recommended that an Oral Reminder be issued. While it is undisputed that the incident could have been addressed informally, through the use of coaching and counseling, I find that Energy Systems has established a legitimate, nondiscriminatory basis for deciding to impose formal discipline, for the reasons articulated by Dr. Sims and Mr. Hunt. First, an Oral Reminder appeared to be appropriate based upon the manual and advice from human resources. Second, the incident was reported by more than one person in a separate office, the I & C office, and the Office of Radiation Protection managers were clearly concerned about their relationship with that "customer" office. Third, it was reported that the work had been delayed as a result of the incident. Fourth, an investigation revealed that this type of incident had occurred before with Ms. Shelton, both with I & C personnel and with her prior supervisors, and it had even occurred previously with the same employee she cursed on this occasion. In this regard, even if Dr. Mlekodaj's comments were ignored and advice from the I & C office (discussed below) concerning the frequency of its occurrence were ignored, the fact that it had happened before with respect to the same employee (Mr. Carpenter) and it happened more than once on February 10, combined with advice from labor relations/human resources concerning her past problems and the disciplinary action that had been taken in similar situations, provided ample support for the conclusion that this was a recurring problem that necessitated formal discipline and that issuance of an Oral Reminder would be appropriate.

Thus, it is clear that there was ample evidence of a legitimate, nondiscriminatory basis for the decision to impose disciplinary action, as well as for the disciplinary action taken.

It also appears that Ms. Shelton's own actions ensured that formal disciplinary action would be taken. In this regard, Mr. Hunt indicated that no decision had been made as to the level of discipline at the time of the February 15 meeting, or even whether discipline should be imposed, and the meeting was for the purpose of getting her version of the events. He described Ms. Shelton's manner as "hostile", and noted that she threw some papers across the table (Tr. 251-56, 274). These papers consisted of her typed workplace diversity complaint, which she offered as her version of the events. This account (quoted below in its entirety) did not reflect any sort of contrition, did not provide specifics concerning the incident, and focused on her own complaints:

> On Friday, February 10, 1995, and (***sic***) incident occurred between me and an I&C Technician in which profanity was used when addressing the I&C Technician. In my estimation, this action was brought on by

circumstances which I had no control over--stress. From 12/22/94 thru 01/30/95 I was off from work sick-pne[u]monia. When I returned to work on 1/31/95, only 3 of 13 surveys had been performed and no performance test conducted on any of the 6 continuous air monitors (CAM) or the 7 monitrons. These areas are required by DOE to be surveyed monthly with a five day grace period. Hence, almost every job task need to be performed by 1/31/95--no later than 2/7/95 in order to keep occur[e]nces from being written. Since I am expected to meet these deadline[s] in addition to performing other job related task[s], why then was it not performed in my absence? I have gone to my management to request some relief in this area but was put off by a promise to get some help with no other discussion concerning this request. Now it appears that I must bear the repercussion from any occur[e]nces coming out of this ordeal This does not excuse my use of profanity--only emphas[i]zes the fact that I get no support from management. The following are examples of non-managerial support and discriminatory actions from I&C.

Management from each I&C group which have moved into this area have shown prejudices against me. When Benny Carpenter and James Payne came to this area, they wanted me to “green tag” all the instruments coming from the field. It is my understanding that any instrument coming from a clean area needs no green tag. Since these monitors are able to detect accidents like Ch[e]rnob[y]l, how can they be deemed clean? My management (Walt Ohnesorge) asked me to green tag them anyway because green tags are required for the I&C shop receiving the instruments per facility manager. I didn’t refuse to do the job but stated if they break each piece of equipment down to the last nut, bolt and washer I would check them. Again, my question--why were these pieces of equipment not surveyed by field hp’s that cover outside areas? Furthermore, I didn’t appreciate James Payne (weekly at the time) using me to seek more feathers for his hat and exerting his authority. Why did my management not stand up for me?

I reported CAM-263 out of service in July ‘94. The instrument had put the building into containment. From July til the present time this instrument continues to go into high alarm with the rate meter reading from 100 to 200 counts per minute. (Most recently 2/8/95--bldg put in containment.) On one occas[]ion I called Max Boren to report the instrument out of service with the above mentioned problem. Max Boren replied that he had other priorities to take care of--3019. Procedures and DOE orders mandate that any OSR be repaired without delay. The message I received is it’s personal not business.

> In conclusion, I have made my apologies to the I&C Technician who never filed a complaint about any of this--just I&C out to get me.

(RX 5). The defensive tone of this account appears to reflect the attitude that "the best defense is a good offense," consistent with Ms. Shelton's understanding (which is apparently incorrect) that no disciplinary action could be taken against her if she had a workplace diversity complaint pending. While Ms. Shelton stated that the stressful work situation she described "does not excuse my use of profanity," in fact she seemed to be asserting the contrary. She also appears to have misconstrued Mr. Carpenter's attitude toward her outburst. Although this document summarizes Ms. Shelton's work concerns and sets forth her claim against I & C for retaliation (discussed below), it does not give particulars as to what happened or offer any sort of reassurance that this type of situation will not recur. Ms. Shelton only provided such reassurance at the meeting when specifically asked to do so. Moreover, based upon her own account of the February 15 meeting, she tried, albeit unsuccessfully, to change the focus to her own work problems. (Tr. 790-93). While it would not be useful to speculate as to what effect a more positive approach might have had, it is clear that Ms. Shelton did little to mitigate the situation and give her management a basis for handling the incident through informal discipline. Indeed, under these circumstances, it would have been imprudent for management to handle this matter informally.

In view of the above, I find that the reason offered by management for the adverse action taken against Ms. Shelton was the true reason, and not a pretext for discrimination. ***See Remusat v. Bartlett Nuclear, Inc.,*** 94-ERA-36 (Sec'y, Feb. 26, 1996) (upholding ALJ's finding that complainant's violations of procedures relevant to radiological protection and reporting requirements on two consecutive days, combined with failure to be forthright in discussions with superiors, was true basis for termination). The evidence establishes the use of profanity and abusive language on the part of the Complainant toward coworkers and demonstrates that the disciplinary action taken was the same as that taken with respect to other employees engaging in similar conduct. ***See generally Hermanson v. Morrison Knudson Corp.,*** 94-CER-2 (Administrative Review Board, June 28, 1996) (noting complainant was not the only one fired for equipment misuse and agreeing with ALJ's conclusion that complainant would have been fired in absence of protected activity).

It appears that this case may more appropriately be classified as a "mixed motive" or "dual motive" case, because there is evidence directly reflecting the use of an illegitimate criterion in the challenged decision. ***See generally Pogue v. U.S. Department of Labor,*** 940 F.2d 1287 (9th Cir. 1991)(reversing Secretary of Labor's finding that Navy would have taken same action against Complainant in absence of protected activity, where some evidence of prior work performance and defiant attitude could reasonably be attributed to retaliation for whistleblower reports); and ***Talbert v. Washington Public Power Supply Systems,*** 93-ERA-35 (Administrative Review Board, Sept. 27, 1996)(adopting ALJ's finding that although decision to transfer

complainant was motivated in part by protected activity of raising safety concerns at meeting, respondent had demonstrated by clear and convincing evidence it would have taken same action in absence of such activity).[36] In this regard, Dr. Mlekodaj is a manager, his hostility toward Ms. Shelton reflects retaliatory intent, and his adverse comments were taken into consideration by the managers who made the decision as to whether to impose discipline. Dr. Mlekodaj's testimony constitutes direct evidence of retaliatory intent, and my conclusion is not based upon inferences such as those based upon temporal proximity. Accordingly, I find that Ms. Shelton's protected activity of testifying in the ***Varnadore*** case was a motivating factor as well as a contributing factor in the adverse personnel action taken against her.

Extended discussion of this matter is unnecessary, as I find that there is overwhelming evidence that Energy Systems would have taken the same adverse action against the Complainant even if she had not testified in ***Varnadore***, as Dr. Mlekodaj's comments had a ***de minimis*** effect when considered along with the legitimate bases for the adverse action, discussed above. Here, unlike ***Pogue,*** the disciplinary action taken against Ms. Shelton was not "substantially disproportionate to that imposed by [the employer] in the past" and evidence was introduced showing that "other employees had received similar disciplinary action based on similar violations." 940 F.2d at 1291. In this regard, Mr. Watson testified and submitted documentation as to other 20 cases at Oak Ridge National Laboratories involving similar violations by employees[37] (***i.e.,*** situations involving abusive and/or profane language directed at supervisors or other workers), both before and after implementation of the Positive Discipline program. In the eight such cases arising after implementation of the Positive Discipline program, six resulted in the issuance of an Oral Reminder, one (involving a physical threat and prior outbursts) led to a Written Reminder, and one (involving verbal assault, profanity, and racial remarks) led to decision-making leave. (Tr. 1469-80; RX 17). Consistent disciplinary action was taken at the Y-12 and K-25 facilities. (RX 15, 16; Tr. 1482-85). In ***Dunham v. Brock,*** 794 F.2d 1037 (5th Cir. 1986), the Fifth Circuit held that abusive or profane language coupled with defiant conduct or demeanor justified discharge of an employee on the ground of insubordination, notwithstanding his protected activity under the ERA. ***See also Kahn v. Secretary of Labor,*** 64 F.3d 271 (7th Cir. 1995) (abusive and inappropriate behavior toward coworkers and supervisors is justification for termination even if employee is whistleblower). While the circumstances here do not involve insubordination and are not as egregious as they were in ***Dunham*** or ***Kahn***, no discharge is involved in the instant case. The issuance of an Oral Reminder was clearly appropriate.

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[36] ***Pogue, Talbert,*** and ***Remusat***, are discussed above.

[37] An additional case involved a visitor at the facility who was warned that if the situation happened again his visitor status would be terminated. Counting that case and Ms. Shelton's, there were 22 cases at Oak Ridge from 1977 until the trial date.

Based upon a review of the evidence discussed above for purposes of the ERA, I also find and determine, under the heightened burden of proof, that clear and convincing evidence establishes that the same unfavorable personnel action would have been taken in the absence of Ms. Shelton's protected "behavior" of testifying in the ***Varnadore*** whistleblower case.

Health Physics Activities Involving I & C Personnel

The other substantial contention that Ms. Shelton has made is that her health physics activities with respect to I & C personnel in Building 3026 (and particularly her approach to "green tagging" and her criticism of I & C's repeated failures to repair a continuous air monitor) were the basis for I & C personnel to retaliate against her by complaining about the cussing incident, thereby leading to the Oral Reminder. While this allegation is not specifically raised in the complaint, Ms. Shelton raised it even before the February 15 meeting in her workplace diversity complaint (***see*** RX 5) and I do not find it to be barred because it was not specifically asserted in the complaint.

Looking first at the environmental statutes, I find that the Complainant has failed to make a ***prima facie*** case. In this regard, it is well settled that complaints addressing occupational safety as opposed to environmental health do not fall within the environmental statutes. ***See, e.g., Tucker v. Morrison & Knudson,*** 94-CER-1 (Administrative Review Board, Feb. 28, 1997). ***But cf. Hermanson, supra*** (finding general safety concerns by employee can have environmental impact such that they would be covered). The instruments and equipment concerned here were being used by personnel within Oak Ridge National Laboratory and there has been no showing that their use had any impact upon environmental health or safety.

The instant claim is, however, covered by the Energy Reorganization Act. In this regard, the conduct covered under the ERA has been interpreted broadly by the Secretary to include "any action or activity related to nuclear safety." ***Tucker, supra, citing DeCresci v. Lukens Steel Co.,*** 87-ERA-13 (Sec'y, Dec. 16, 1993). Moreover, the ERA has been specifically applied to a complaint arising out of safety requirements relating to surveying and tagging contaminated tools. ***See Bechtel Construction Co. v. Secretary of Labor,*** 50 F.3d 926 (11th Cir. 1995). In ***Bechtel,*** the Court of Appeals for the Eleventh Circuit (while agreeing with respondent that general inquiries regarding safety did not constitute protected activity) held that the Secretary had properly found the complainant's internal complaints, which involved particular, repeated concerns about safety procedures for handling contaminated tools, were protected activity actionable under the ERA.

As noted above, to establish a ***prima facie*** case under the ERA, a complainant must establish (1) he engaged in protected activity, (2) he was subjected to adverse action, (3) the respondent was aware of the protected activity when it took the adverse action, and (4) the adverse action was retaliatory in response to the protected activity.

Fugate v. Tennessee Valley Authority, 95-ERA-50 (Administrative Review Board, Dec. 12, 1996).

The Complainant has satisfied the first three of these criteria. First, the health physics activities concerned here, including green tagging of instruments and complaining about failure to repair an instrument, relate to nuclear safety and are covered by the ERA. ***See Bechtel, supra; Tucker, supra.*** Second, as discussed above, the issuance of an Oral Reminder is an adverse personnel action. Third, Energy Systems was clearly aware of the health physics activities in which Ms. Shelton was involved, including green tagging and providing feedback to I & C on instrument repair, as they were a part of her job, and she specifically brought her difficulties in this area to her management's attention in the workplace diversity complaint (quoted in the previous section) that she provided at the February 15 meeting.

The fourth criterion is more difficult. Ms. Shelton has clearly produced some facts that give rise to an inference of retaliatory intent. It is unclear, however, that these facts are sufficient to establish a ***prima facie*** case, particularly under the Eleventh Circuit decision in ***Dysert,*** which requires establishment of this element by a preponderance of the evidence.

There are several facts that strongly suggest that there was some retaliatory intent on the part of I & C personnel, and specifically Mr. Boren and Mr. Payne. First, as suggested in Ms. Shelton's Posthearing Brief at p. 15, the close timing between the incident when Ms. Shelton gave low ratings to I & C on their "report card" based upon failure to repair the "FRM" monitor and the associated continuous air monitor CAM 263 (CX 86) (dated November 18, 1994); Mr. Sowder's E-mail to Mr. Boren on the incident (CX 49) (dated January 17, 1995); and the February 10 incident leading to the Oral Reminder (issued on February 23, 1995), constitutes evidence of discriminatory intent. Second, Mr. Boren admitted that the CAM 263 incident was "embarrassing," and he was actively involved in ensuring that some kind of disciplinary action would be taken against Ms. Shelton. According to Mr. Sowder, it was Mr. Boren who made the informal complaint. Third, Mr. Payne apparently had frequent run-ins with Ms. Shelton, including one in which she used profanity in complaining about the CAM 263 not being repaired, as well as disagreements concerning the "green tagging" issue. Although he was not in Mr. Carpenter's chain of supervision, he made multiple phone calls after the incident occurred and he appears to have been overzealous in regard to his involvement in this matter. Mr. Payne also was directly involved in meetings relating to the decision to impose discipline on Ms. Shelton, and his comment to the effect that this type of incident occurred possibly on a monthly basis at the February 13 meeting was taken into consideration in deciding whether to impose formal discipline. While neither Mr. Hunt nor Dr. Sims were present at that meeting, they had access to memoranda concerning it prepared by Mr. Spence (RX 27) and Mr. Sowder (CX 67), which included the reference to this being a monthly occurrence. Mr. Payne admitted that he had not

intended to say that Ms. Shelton used profanity in an abusive manner on a monthly basis, although his comments may have been so construed.

On the other hand, there are circumstances suggesting that the adverse action was not retaliatory. In this regard, neither Mr. Boren nor Mr. Payne was a high level manager, neither was asked for a recommendation, and apparently neither was advised of the final outcome. The decision as to the level of discipline to be imposed (and whether any disciplinary action should be taken) was made by line management at the Office of Radiation Protection with input from labor relations, and in making the decision they were well aware of Ms. Shelton's allegations concerning retaliatory intent on the part of I & C managers, so there was no insidious effect, as in the case of Dr. Mlekodaj's involvement. Of course, Ms. Shelton's managers at the Office of Radiation Protection would have no interest in hampering her health physics activities.

Even assuming, ***arguendo***, that the Complainant has established a ***prima facie*** case on this issue, I find, as discussed above, that the reason offered by management for the adverse action taken against Ms. Shelton was the true reason, and not a pretext for discrimination. This matter is discussed extensively in the preceding section. Here, an undisputed violation of Energy Systems procedures which undeniably led to a single adverse personnel action is involved, rather than vague or shifting explanations by management, as in ***Bechtel***. In addition, as noted above, there was no disparate treatment; similar action was taken against similarly situated employees in the past. The Complainant has failed to satisfy her ultimate burden of persuasion.

Furthermore, I am unable to conclude that the Complainant has established her burden of proving by a preponderance of the evidence that her protected activity while performing health physics duties for I & C was a contributing factor to the adverse action taken against her so as to give rise to a "mixed motives" case. The facts are compatible with Mr. Payne and Mr. Boren retaliating against Ms. Shelton because of her previous health physics activities, and even with their taking action to prevent her from acting unfettered in performing her future health physics activities. They are equally compatible with Mr. Payne, who witnessed one of the incidents, and Mr. Boren, who supervised the employee involved, reporting this incident for the sole purpose of ensuring that this type of incident did not occur again. Moreover, it is not clear that Mr. Boren, although embarrassed by the equipment repair incident, was hostile toward Ms. Shelton, as his actions did not reflect any such hostility. It is also not clear that Mr. Payne intentionally misrepresented the facts or even that his statement concerning the frequency of the incidents (which he did not intend to include the abusive use of profanity) was misconstrued. Of course, as noted above, these I & C supervisors were not consulted on the issue of whether any type of formal disciplinary action should be taken and they were only able to influence the outcome through the facts they provided.

Further, even assuming that the Complainant has satisfied this burden, I find that Energy Systems has proven by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any retaliatory actions by Mr. Payne or Mr. Boren. In this regard, I have set forth the legitimate basis for the decision above. This matter would have been brought to the attention of Dr. Sims by Mr. Robbins anyway, and there was an ample basis for the actions taken even ignoring the comments by Mr. Payne and Mr. Boren, as well as those by Dr. Mlekodaj. This was not a case of termination. Ms. Shelton was given an Oral Reminder, the lowest stage of formal discipline and one that had been imposed in similar situations in the past. There was no disparate treatment.

RECOMMENDED ORDER

IT IS HEREBY RECOMMENDED that the complaint in this matter be **DISMISSED**.

PAMELA LAKES WOOD
Administrative Law Judge

Washington, D.C.

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for final decision to the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210. See 29 C.F.R. § 24.6; 61 Fed. Reg. 19978,19982 (May 3, 1996).